No. 91-865

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS, DOUGLAS C. CANNON and SHELDON AND PAULINE BROZER on behalf of ADAM BROZER,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) requires the States to provide a free appropriate public education to all children with disabilities through personalized instruction with sufficient support services to enable the child to benefit educationally from that instruction.

The questions presented for review are:

1. Whether the Seventh Circuit's ruling is in conflict with *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176 (1982), in that it imposes an additional obligation on the States to defer to parental hostility to the Individualized Education Program (IEP) developed for the child, when the IEP is otherwise reasonably calculated to enable the child to receive educational benefits?

2. Whether the Seventh Circuit's grant of a parental veto power over a proposed IEP conflicts with the other circuits' rulings that parental preference does not determine the appropriateness of an IEP?

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BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS, DOUGLAS C. CANNON and SHELDON AND PAULINE BROZER on behalf of ADAM BROZER,

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 23, 1991.

OPINIONS BELOW

The August 21, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Respondent

Board of Education's Petition for Rehearing is not published, but is reprinted in the appendix hereto. App. 17.

The July 23, 1991 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. Board of Education of Community Consolidated School District No. 21, Cook County, Illinois v. Illinois State Board of Education, Douglas C. Cannon and Sheldon and Pauline Brozer on behalf of Adam Brozer*, at 938 F.2d 712 (7th Cir. 1991), and is reprinted in the appendix hereto. App. 1.

The October 22, 1990 memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix hereto. App. 19.

The May 7, 1990 administrative decision and order of Douglas C. Cannon, Level II Hearing Officer, is not reported but is reprinted in the appendix hereto. App. 40.

The March 8, 1990 administrative decision of Margie Best, Level I Hearing Officer, is not reported but is reprinted in the appendix hereto. App. 52.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on July 23, 1991. On August 21, 1991, the court denied the Respondent Board of Education's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS

Part A, §§ 602(16)-(19) and Part B, §§ 612 and 615 of the Education of the Handicapped Act, 20 U.S.C. §§ 1401(16)-(19), 1412 and 1415 (1988).[1]

Section 14-8.02 of the Illinois School Code, Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02.

The above statutes are reprinted in the appendix hereto. App. 73.

STATEMENT OF THE CASE

Petitioner Illinois State Board of Education ("State Board"), pursuant to the Individuals with Disabilities Education Act ("IDEA"), is responsible to ensure that all children with disabilities in Illinois between the ages of three and twenty-one are provided a free appropriate public education. 20 U.S.C. § 1412 (1988). The State Board is charged with the administration of the IDEA and the distribution of federal funds to local educational agencies to implement the provisions of the IDEA. 20 U.S.C. § 1416 (1988). The basis for the federal jurisdiction of the district

[1] Section 901(a)(1) of the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1141, amended the Education of the Handicapped Act to revise the short title to the "Individuals with Disabilities Education Act" (IDEA) and to replace all references to "handicapped children" with the new phrase "children with disabilities," among other substantive amendments which do not affect the sections of the IDEA at issue in this case.

court is pursuant to Section 1415(e)(2) of the IDEA. 20 U.S.C. § 1415(e)(2) (1988).

The State Board must monitor local educational agencies to ensure compliance with all the provisions of the IDEA. 20 U.S.C. § 1412 (1988). The State Board may provide special education and related services directly when it has been determined that the local educational agency is unable or unwilling to maintain a program of a free appropriate public education which meets the requirements of the IDEA. 20 U.S.C. § 1414 (1988). Illinois law provides procedures parallel to those contained in the IDEA to ensure compliance with the due process safeguards required by the IDEA. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02.

Local school boards are required to determine the eligibility of children to receive special education. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). A case study is prepared for the child and is reviewed by professional personnel in a multi-disciplinary staff conference to develop an individualized education program ("IEP"). 20 U.S.C. § 1401(19) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). The parents of the child are provided with a copy of a multi-disciplinary conference summary report and informed of their right to obtain an independent education evaluation. 20 U.S.C. § 1415(b) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). If there is disagreement between the local school officials and the parents regarding the proposed IEP, either party may request an impartial due process hearing. 20 U.S.C. § 1415(b)(2) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b)(f).

In Illinois, the due process safeguards of Section 1415 of the IDEA, 20 U.S.C. § 1415 (1988), are provided through a two-tiered hearing procedure. Impartial hearing officers adequately trained in special education law

by the State Board conduct the hearings. The hearing officers are not employees of the State Board, but are actively recruited by the State Board. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(g)(h).

The Level I hearing is directed toward bringing out all facts necessary to render an informed decision. The local school board must present evidence that the special education needs of the child have been appropriately identified and that the special education program proposed to meet the needs of the child is adequate, appropriate and available. The parents and the child have the right to be present at the hearing and to present evidence and cross-examine witnesses. The hearing officer must render a decision, including findings of fact, which shall be binding upon the local school board and the parents unless an appeal is filed with the State Board.

A Level II hearing is provided to any party aggrieved by the Level I decision through appeal to the State Board. The State Board provides the impartial hearing officer to review the Level I decision. The parties may present oral argument and additional evidence before the Level II hearing officer. Upon completion of the review, the Level II hearing officer shall render a final decision. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(h).

The decisions of the impartial due process hearing officers are final without review or adoption by the State Board. The State Board is obligated to appoint the hearing officers, but cannot assert a position on the merits of the dispute between the parents and the local school district. 20 U.S.C. § 1415(b)(2) (1988). Any party aggrieved by the decision of the Level II hearing officer may bring a civil action in any court of competent jurisdiction. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(j); 20 U.S.C.

§ 1415(e)(2) (1988). The State Board is required to monitor compliance with the final decision after all administrative and legal remedies have been exhausted. 20 U.S.C. § 1414 (1988).

This case concerns the appropriateness of a proposed IEP for Adam Brozer ("Adam"), a student at Holmes Junior High School, School District No. 21, Cook County, Illinois ("school district"). R.25, par. 6.[2] Adam is a child with disabilities within the meaning of the IDEA. R.25, par. 6. Adam's primary disability is a behavior disorder with secondary learning disability. R.25, par. 9; Decision and Order of Level II Hearing Officer, App. 43.

The facts are not in dispute. Adam was first identified as behavior disordered in May of 1986. R.25, par. 9. The school district recommended that Adam be placed in a student support center in the public school, where he would receive extensive services for his behavior disorder from the classroom teacher, with mainstreaming for physical education.[3] Respondents Sheldon and Pauline Brozer ("parents"), Adam's parents, refused the recommendation, and Adam remained in a learning disability resource program. The parents subsequently agreed to Adam's placement in

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[2] Adam is currently fifteen years old and enrolled at Stevenson High School District No. 125, Prairie View, Illinois, where he is in a self-contained classroom receiving special education and social work services for primary behavior disorder/secondary learning disability. Although Adam is no longer enrolled in Respondent School District No. 21, he remains eligible for special education services from the State and retains the right to the due process safeguards provided for children with disabilities until he is twenty-one years old.

[3] "Mainstreaming" refers to the preference to educate children with disabilities with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(5) (1988).

the student support center. Adam was also to receive one hour of social work related services per week, but the services were terminated by the parents. Decision of Level I Hearing Officer, App. 61.

Adam experienced problems in the unstructured setting within the public school, although he progressed in his course work and received Bs and Cs. Adam's behavior in class deteriorated; he was at times violent and disruptive. The school district recommended that Adam be transferred to an alternative public school for children who suffer from severe behavioral disorders. The parents refused. The school district agreed to continue Adam's existing placement to avoid conflict with the parents. R.18, Vol. II, Level I Transcript 2/23/90, p. 258; R.19, Vol. III, pp. 282-295.

The next school year, Adam's behavior worsened. One of his teachers described Adam as "out of control." R.18, Vol. II, Level I Transcript 2/23/90, p. 262. The parents had withdrawn consent for Adam to be disciplined in school. They had refused social work services. They would not approve the use of after school detentions or quiet lunches as interventions to control Adam's behavior. The parents refused to provide Adam's medical records to the school district. The school district therefore could not make a determination whether medication would improve Adam's behavior. Decision of Level I Hearing Officer, App. 65.

Due to the continued objections of the parents to the options proposed by the school district to improve Adam's performance in school, the school district requested a due process hearing from the State Board to determine the appropriate program for Adam. R.19, Vol. III, pp. 23-24. At the Level I hearing, the parents (who were repre-

sented by an attorney) contended that Adam had learning disabilities, which resulted in his behavior problems. Therefore, according to the parents, the school district was providing inappropriate and inadequate services to Adam. Decision of Level I Hearing Officer, App. 64.

The Level I Hearing Officer agreed with the school district that Adam had a primary behavior disorder and a secondary learning disability. The Hearing Officer found that there were irreconcilable differences between the school district and the parents.

The Hearing Officer further found that Adam's current program was not appropriate and the school district was correct in seeking a more restrictive program which would allow Adam to achieve success in school. The Hearing Officer found that Adam was in need of a restrictive placement which could provide a comprehensive structured program with immediate consequences for Adam's behavior at all times. Decision of Level I Hearing Officer, App. 66.

The Hearing Officer specifically found that the school district had complied with the procedural requirements of the IDEA:

> The District has exhibited good faith in *all* its dealings in this case. Any procedural errors, should any have occurred, are *de minimus*, given the history of refusals of service by the parents. For example, it is not reasonable that even minimal social work services be denied this child by his parents, as such action directly denies him his right to a free appropriate public education. The child's rights have been fully observed by the District.

Decision of Level I Hearing Officer (emphasis in original), App. 67.

In light of the parents' continued objections to the various proposals of the school district and the parents' "under-

mining" of the school district's efforts by making derogatory comments about school staff members in Adam's presence, the Level I Hearing Officer concluded that Adam's education could only be effectuated if the parents were not involved on a continuous basis in second guessing the disciplinary efforts of the school district. Decision of Level I Hearing Officer, App. 67-68. The Level I Hearing Officer therefore ordered that Adam should be placed at public expense in a private residential school. Decision of Level I Hearing Officer, App. 67-68.

The parents sought review of the Level I decision, requesting that Adam be maintained in the student support center at the public school or, in the alternative, that the Level I decision be modified to place Adam in the private residential school as a day student. R.45, Ex. 2.

Respondent Douglas C. Cannon, the Level II Hearing Officer, noted the "extremely adversarial and distrustful relationship" existing between the school district and the parents, as evidenced by their conduct during the hearing. The Hearing Officer found that the parents' state of mind (which he described as a "siege mentality") would likely affect the success or failure of the school district's proposed program for Adam. Decision and Order of Level II Hearing Officer, App. 44.

The Level II Hearing Officer adopted the findings of the Level I Hearing Officer that Adam's existing placement in the student support center was not appropriate to his needs and a more restrictive program was necessary to allow Adam to achieve success in school. The Level II Hearing Officer rejected the Level I Hearing Officer's order of a private residential school as being violative of the requirement of the IDEA that the child be placed in the least restrictive environment that will

meet the child's needs. Decision and Order of Level II Hearing Officer, App. 45-46.

The Level II Hearing Officer concluded that because no program for Adam would be successful without parental cooperation, a private school day placement was the only program in which parental cooperation could be achieved. Decision and Order of Level II Hearing Officer, App. 47. The Hearing Officer specifically noted the opinion of the parents' expert that it was doubtful that any program offered by the school district would be of benefit to Adam due to the parents' hostility toward the school district. Decision and Order of Level II Hearing Officer, App. 45-46. The Hearing Officer ordered Adam's referral to a private day school, located within thirty minutes commuting time of their home, that meets Adam's educational needs. Decision and Order of Level II Hearing Officer, App. 48.

The school district appealed the Level II Hearing Officer's decision to the federal district court pursuant to 20 U.S.C. § 1415(e)(2) (1988). R.1. The school district argued that the decision of the Level II Hearing Officer, finding that the irreconcilable differences between the parents and the school district necessitated a private placement, was not supported by the evidence. R.1. The school district further alleged as error the Level II Hearing Officer's reliance on parental hostility as determinative of the appropriate placement for Adam. R.1.

The district court affirmed the decision of the Level II Hearing Officer. The court found that the parents' hostility had seriously interfered with the ability of the school district to provide Adam with an appropriate education in a public school. App. 37. The court concluded that placement in a private day school facility was necessary in or-

der for Adam to obtain an educational benefit as mandated by the IDEA. App. 38.

The school district appealed to the Seventh Circuit. The Seventh Circuit stated the issue as whether the public school placement recommended by the school district was inappropriate for Adam and whether the private day placement ordered by the Level II Hearing Officer was indeed reasonably calculated to be of educational benefit to Adam. App. 6.

The Seventh Circuit affirmed the decision of the district court and the Level II Hearing Officer. App. 11-12. The court found that the school district's recommended program for Adam was not acceptable or appropriate under the IDEA because the relations between the parents and the school district guaranteed its failure. App. 9. The court agreed with the school district that consideration of parental hostility to a proposed IEP would result in rejection of the IEP "simply because the parents, perhaps irrationally, oppose it." App. 9-10. The court stated that its concern was to find a program which would be of educational benefit to the child. App. 10. The court concluded that if the parents are so opposed to an IEP as to undermine its value to the child, the IEP does not meet the substantive requirements of the IDEA. App. 11.

In a dissenting opinion, Circuit Judge Wood viewed the majority opinion as allowing the parents an absolute veto over the school district's proposed educational program. App. 13. The dissent found that the school district fully complied with the requirements of the IDEA and the decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), in that the proposed IEP was reasonably calculated to enable Adam to receive educational benefits. App. 13. The dissent noted that the "continually excessive obstructive

conduct" of the parents was not a valid reason for the majority to order a placement acceptable to the parents. App. 14, n.2.

The school district's petition for rehearing and suggestion for rehearing *en banc* was denied. App. 17.

REASONS FOR GRANTING THE WRIT

I

THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S RULING IN *ROWLEY* THAT LOCAL AND STATE EDUCATIONAL AGENCIES ARE RESPONSIBLE FOR DETERMINING AND IMPLEMENTING AN APPROPRIATE IEP FOR CHILDREN WITH DISABILITIES.

The primary responsibility for developing and executing educational programs for children with disabilities has been placed by Congress upon local and state educational agencies. This Court has recognized the States' traditional role of providing for the education of our children and has given deference to educators in choosing the educational methods most suitable to a child's needs. *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176, 208 (1982). *Rowley* instructs that the IDEA requires State and local educational agencies to provide personalized instruction with sufficient support services to permit the child to benefit from that instruction. 458 U.S. at 203.

The decision of the Seventh Circuit, holding that an otherwise appropriate IEP does not meet the requirements of the IDEA solely because of the parents' general hostility to the proposed IEP, results in a fundamental

transformation of the *Rowley* standard. The Seventh Circuit's decision has the precedential impact of altering the carefully structured and balanced process by which educators and parents formulate individually tailored programs to provide educational and support services to children with disabilities.

In reviewing compliance with the requirements of the IDEA, *Rowley* holds that a court's inquiry is twofold:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 206-07. In applying this test, the proper focus is on the program proposed by the school district and not the program sought by the parents. *See Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 88 (D.C. Cir. 1991); *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir.), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987); *Wilson v. Marana Unified School Dist. of Pima County*, 735 F.2d 1178, 1184 (9th Cir. 1984); *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 21 (10th Cir. 1985).

The Seventh Circuit's opinion does not apply the *Rowley* test to the school district's proposed IEP. The Seventh Circuit, rather, defined the issue as whether the Level II Hearing Officer's order of a private day placement was reasonably calculated to be of educational benefit to Adam.

App. 6. The decision is not based upon any violation of the provisions of the IDEA by the school district. The Seventh Circuit accepts and gives weight to a test which allows parental objection, no matter how unreasonable, to determine whether a proposed IEP is reasonably calculated to confer an educational benefit upon the child. This test is at variance with the standard enunciated in *Rowley*, which has been consistently followed by the federal courts until now.

Congress recognized in passing the IDEA that consensus will not always be reached between school officials and parents on an appropriate IEP. The IDEA provides for an elaborate set of procedural safeguards to resolve such disputes. Section 1401(19) of the IDEA provides for parental participation in the development of the IEP.[4] Section 1415(b)(2) allows for an impartial due process hearing to determine whether the local educational agency is providing a free appropriate public education.

The decisions rendered in this case by the hearing officers and the courts frustrate the carefully tailored scheme of providing education to children with disabilities. The decision-makers allowed the parents' hostility to dominate the process, instead of considering the parents' hostility as one factor in determining the appropriate plan to meet Adam's educational needs. Support services, such as psychological and counseling services, could have been provided in Adam's IEP to address his ability to receive an educational benefit in light of his parents' hostility to an otherwise appropriate IEP. 20 U.S.C. § 1401(17) (1988).

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[4] Section 1401(19) does not require parental approval of the IEP. 20 U.S.C. § 1401(19) (1988).

In passing legislation to ensure that children with disabilities receive a free appropriate public education, Congress never intended that the emotional and non-measurable forces of parental approval should control the educational decision. On the contrary, the responsibility was placed on the State and local educational agencies to determine the appropriate IEP for children with disabilities. 20 U.S.C. §§ 1401(18)-(19).

The Seventh Circuit's decision has sanctioned parental rejection of a school district's proposed IEP "simply because the parents, perhaps irrationally, oppose it." App. 9-10. Compliance with the Seventh Circuit's decision will result in educators being forced to acquiesce in the demands of parents, regardless of whether those demands enable the child to receive any educational benefit. *See* dissenting opinion, App. 12-15.

The Seventh Circuit's decision leaves the administration of education for children with disabilities in confusion. The States are responsible to assure compliance with the provisions of the IDEA. 20 U.S.C. § 1412 (1988). The language of the IDEA indicates that such compliance is measured by evaluating local educational agencies' provision of special education to children with disabilities. 20 U.S.C. §§ 1412 and 1413. The Seventh Circuit's decision reaches outside the language of the IDEA to measure compliance by focusing on parental approval of the education provided by the local educational agencies.

The error in the Seventh Circuit's reasoning is clearly illustrated in this case. It is telling that none of the parties here has obtained the relief from the administrative and court proceedings which was originally sought. The Brozers sought Adam's retention in the local school. The school district proposed that Adam attend a public school

operated by the district for children like Adam with behavioral and learning disorders. The Level I Hearing Officer ordered a private residential placement. The Level II Hearing Officer, whose decision was affirmed by the district court and the Seventh Circuit, ordered a private day placement.

When Adam recently transferred to a new school district, the school district proposed to continue Adam in the private day placement, which was affirmed as appropriate by the Seventh Circuit. App. 11-12. The parents rejected this proposal. Adam is now attending the public high school in a self-contained classroom receiving special education and social work services. Thus, it appears that contrary to the parents' defense of the Level II Hearing Officer's decision in the courts below, the parents were in fact dissatisfied with the private day placement. The parents continue to insist on their preferred placement in the local school.

The Seventh Circuit's articulated concern to find a program that will be of educational benefit to the child was not realized in this case. App. 10. It is not in the best interest of the child's educational needs to abandon an IEP found to be educationally appropriate to meet those needs. As the dissent aptly noted, "The district board, the hearing officers, the district court and I all agree it was the parents' objectionable conduct which has forced this result." App. 14, n.2.

"This result" leaves the child without an educational program objectively designed to enhance the child's educational achievement and allows a parental veto over decisions made by professional educators. The Seventh Circuit's decision sets a disturbing precedent which must be reversed by this Court.

II

THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS THAT PARENTAL PREFERENCE DOES NOT DETERMINE THE APPROPRIATENESS OF AN IEP.

The Seventh Circuit's decision not only fails to follow this Court's holding in *Rowley*, but conflicts with the decisions of the other circuits which have consistently followed the *Rowley* standard. The other circuits have applied the *Rowley* standard by focusing on the proposed IEP, not the alternative program sought by the parents. *Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 88 (D.C. Cir. 1991); *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 149 (1991); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987); *Wilson v. Marana Unified School Dist. of Pima County*, 735 F.2d 1178, 1184 (9th Cir. 1984); *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 21 (10th Cir. 1985).

The Seventh Circuit's opinion does not discuss the appropriateness of the school district's proposed IEP. The court summarily rejected the IEP as violative of the second prong of the *Rowley* test because the parents' hostility to the proposed IEP guaranteed its failure. The Seventh Circuit improperly focused on the conduct of the parents in determining whether the school district's proposed IEP complied with the requirements of the IDEA.

The other circuits have addressed the same conflict which confronted the Seventh Circuit, with the opposite

result. The circuits have properly applied the *Rowley* test to "focus on the District's proposed placement, not on the alternative that the family preferred." *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). In *Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir.), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991), the Fourth Circuit found the school officials' offer of services to be in compliance with the requirements of the IDEA, over the parents' objection that the services were meaningless to the child. The court stated that any lack of benefit to the child was due to the decisions and conditions the parents had made for their child's education and not due to any violation by the school of the requirements of the law. *Id.* at 369. In *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991), the First Circuit refused to "abet" parents who objected to an IEP created "by their own obstructionism" and found the school district's proposal to meet the *Rowley* standard. *Id.* at 995.

The Seventh Circuit itself has held that

> *Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right . . . to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their child.

Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The majority opinion distinguished *Lachman* as not dispositive of the issue presented here. App. 9. The dissent found no difference between the dispute presented and the dispute considered in *Lachman*. App. 13.

The Seventh Circuit distinguished all other reported cases on the facts and ignored the *Rowley* standard to be

applied to the legal analysis. *See* App. 9-10, n.4. Whether the dispute involves educational theory,[5] the parents' unilateral removal of their child from the approved IEP,[6] or the parents' objection to the IEP after its implementation,[7] the school district's responsibility under the dictates of the IDEA and *Rowley* remains the same. It is the parents' conduct, not any deficiency in the school district's proposed IEP, which would prevent Adam from receiving an educational benefit.

The IDEA requires school districts to provide a "basic floor of opportunity" of specialized instruction and related services individually designed to provide an educational benefit to a child with disabilities. *Rowley*, 458 U.S. at 201. The IDEA does not require the instruction provided to "be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice." *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original). It is the parents' choice to accept the free appropriate public education provided or to reject it. Here, the parents, by their very conduct, chose to reject the education offered by the school district.

The Seventh Circuit's opinion attempts to avoid the harsh result of the parents' decision by skewing the *Rowley* test. The other circuits have correctly applied *Rowley* and focused on the conduct of the school district, thus

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[5] *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[6] *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15 (10th Cir. 1985); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

[7] *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990).

avoiding the dilemma created by the hearing officers and the courts in this case.

The Seventh Circuit's decision stands alone in conflict with the clear command of *Rowley* and its uniform acceptance by the other circuits. Accordingly, this Court should exercise its supervisory power to reverse the Seventh Circuit's deviation from the standard applied by the other courts of appeals.

CONCLUSION

For all of the reasons stated above, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS, DOUGLAS C. CANNON and SHELDON AND PAULINE BROZER on behalf of ADAM BROZER,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3599

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS,

Plaintiff-Appellant,

v.

ILLINOIS STATE BOARD OF EDUCATION, DOUGLAS C. CANNON and SHELDON and PAULINE BROZER on behalf of ADAM BROZER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3087—**George W. Lindberg,** *Judge.*

ARGUED MAY 28, 1991—DECIDED JULY 23, 1991

Before CUMMINGS, WOOD, JR. and FLAUM, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Adam Brozer is a fifteen-year-old junior high school student who is handicapped primarily by a behavior disorder and also by a learning disability. In this appeal, brought pursuant to the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* ("EHA"),[1] the sole issue is whether the district court

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[1] 1990 amendments have renamed the EHA. It is now the Individuals with Disabilities Education Act. See Pub.L. No. 101-476, 104 Stat. 1141.

erred in affirming an order of the Illinois State Board of Education directing that Adam be placed in a private day school near his family's residence in Wheeling, Illinois.

BACKGROUND

Adam was first identified as behavior disordered in May 1986. His school district, here the plaintiff, recommended that Adam be placed in the Student Support Center ("SSC") of the Kilmer School, a public school in Buffalo Grove, Illinois. Adam's parents acquiesced in the recommendation after initially resisting, and Adam was placed in an educational program run through the SSC at Kilmer.

From February 1987 through the end of the 1988-1989 school year, Adam progressed moderately, receiving grades in the "B" to "C" range. Adam's classroom teacher provided extensive services for his behavior disorder in the 1988-1989 school year, but his behavior deteriorated. He was at times disruptive and violent. The district became concerned that adequate support services would not be available to Adam the following year at Holmes Junior High School in Wheeling. After holding a multi-disciplinary staff conference in February 1989 to discuss appropriate placements, the district recommended that Adam be placed at the Behavior Education Center at Jack London School, also in Wheeling ("BEC/Jack London"). BEC/Jack London is an alternative public school for students who suffer mainly from severe behavioral disorders.

In May 1989 another multi-disciplinary staff conference was held to formulate the "individualized educational program" or IEP, required under the EHA. See 20 U.S.C. § 1401(18). Again the district recommended the BEC/Jack London placement. The Brozers objected, preferring that Adam be placed at the Student Support Center at Holmes Junior High. The district deferred, and Adam started junior high school at Holmes in the fall of 1989.

At Holmes, Adam's behavior worsened rapidly. One of his teachers described him as "out of control," and he

was failing all of his first semester classes. Because the Brozers withdrew their consent for Adam to be disciplined in school or to receive social services, Adam's teachers could not as easily intervene to teach Adam to behave responsibly.

On November 11, 1989, at a third multi-disciplinary staff conference, the MDC team concluded that Adam's placement at Holmes was failing to meet his educational needs. The district again recommended a more restrictive placement for Adam at BEC/Jack London. When Adam's parents refused to consent to this placement, the district initiated the informal due process review procedure established by 20 U.S.C. § 1415(b)(1)(E) to determine the appropriate placement for Adam.

The Level I (local review) hearing was held on February 23 and 28, 1990. Adam's parents opposed the BEC/Jack London placement on the grounds that because Adam was not mainly behavior disordered, the BEC/Jack London facility did not suit his needs. The Level I hearing officer agreed with the district that Adam was primarily behavior disordered and only secondarily learning disabled. The hearing officer also noted the "irreconcilable differences" that had developed between the Brozers and the district. She listed actions taken by the Brozers which impeded the district's efforts to aid Adam's education. Among these were: 1) the parents' refusal of support services for Adam; 2) the parents' refusal to supply Adam's medical history to his school; 3) the parents' refusal to allow detention or quiet lunches to be used as intervention strategies for Adam; 4) the fact that the parents had made derogatory comments about school staff members in Adam's presence, with the effect of undermining the school's educational programs. In light of these problems, the Level I hearing officer found that Adam's education could only "be effectuated if the parents are not involved on a continuous basis in second guessing * * * the disciplinary efforts of the educators." To this end she ordered that Adam be enrolled, not at BEC/Jack London, but at

public expense at a private residential school, the Arden Shore Residential Educational Facility in Lake Bluff, Illinois. The hearing officer ordered that Adam be placed at BEC/Jack London until Arden Shore could accommodate him.

The Brozers appealed the Level I decision and order, requesting at the Level II (the state educational agency) hearing that Adam be placed either at Holmes or at a private day placement closer to home than Arden Shore. The Level II officer, like the Level I officer, noted the extremely adversarial relationship between the Brozers and the district, likening the Brozers' mindset to a "siege mentality." He agreed that "the state of mind of the parents [was] likely to affect the success or failure of the District's proposed placement at Jack London School." In fact, he stated that because the district's proposed placement had been "poisoned" in Adam's mind by his parents, there was "no reason to expect that the [BEC/Jack London] placement will be successful." The Level II officer thus concurred in the district's judgment that Adam needed a more restrictive placement than Holmes. However, he felt the Level I officer had not upheld her obligation to order the least restrictive placement that would still meet Adam's needs. See 20 U.S.C. § 1412(5). Specifically he did not feel that the evidence supported the Level I officer's finding that Adam needed to be enrolled at a private residential school. He ordered the school district to find Adam a placement at a private day school within 30 minutes commuting distance from the Brozers' residence or within 10 miles from the edge of Adam's school district.

The school district appealed to federal district court pursuant to 20 U.S.C. § 1415(e)(2). It contended that the Level II hearing officer erred in considering the Brozers' hostility to the BEC/Jack London placement as a part of his analysis of whether BEC/Jack London was an appropriate placement under the EHA. It requested an order placing Adam at BEC/Jack London. The district court entered summary judgment affirming the Level II hearing

officer's order, and the school district appealed to this Court.[2]

ANALYSIS

The Education for the Handicapped Act provides federal funds to assist states in educating handicapped children. To receive funds, a state must provide each handicapped child with a "free appropriate public education" tailored to his or her needs by an "individualized educational program."[3] The Supreme Court has defined a "free appropriate public education" as one which guarantees a reasonable probability of educational benefits with sufficient supportive services at public expense. See *Board of Education v. Rowley*, 458 U.S. 176, 188-189. A two-part test is used to evaluate a state's compliance with the mandates of the EHA:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Rowley, 458 U.S. at 207. If the state has satisfied the procedural requirements of the EHA and the program de-

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[2] Defendants note that our jurisdiction is doubtful because the district court left a counterclaim asserted by the Brozers unresolved. A pending counterclaim ordinarily prevents a judgment from being final and thus precludes appeal. *In re Berke*, 837 F.2d 293 (7th Cir. 1988). However, if it is clear that the work of the district court is finished, a notice of appeal can be effective in spite of formal difficulties in the judgment. See *Trzcinski v. American Casualty Co.*, 901 F.2d 1429, 1431 (7th Cir. 1990). Here the parties have represented that they have settled the counterclaim and thus we find appellate jurisdiction.

[3] The state of Illinois has established a set of procedures parallel to those contained in the EHA to ensure that it meets the requirements of the Act. Compare 20 U.S.C. § 1401, 1415 with Ill. Rev. Stat. ch. 122 ¶¶ 14-1.02, 14-8.02. The school district's appeal is based on Illinois state law as well as on the federal statute. We will not engage in a separate analysis of the state law claim.

veloped by the state is designed to enable the handicapped child to receive educational benefits, the courts can require no more. The purpose of the EHA is to "open the door of public education" to handicapped children, not to educate a handicapped child to his or her highest potential. *Id.* at 192.

The issue on appeal is narrowly focused on the second of the two questions posed in the Supreme Court's test. The parties now agree on the proper characterization of Adam's handicaps. The state has complied with the procedures set forth in the EHA. The question is simply whether the BEC/Jack London placement recommended by Adam's school district was inappropriate for Adam and whether the private day placement ordered by the Level II hearing officer is indeed reasonably calculated to be of educational benefit to Adam.

Because judges are not trained educators, judicial review under the EHA is limited. When reviewing outcomes reached through the administrative appeals procedures established by 20 U.S.C. §§ 1415(b) and (c), a district court can hear additional evidence and "make an independent decision as to whether the requirements of the act have been satisfied * * * based on a preponderance of the evidence." *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988), certiorari denied, 488 U.S. 925. However, it must give "due weight" to the results of those proceedings, *id.*, bearing in mind not "to substitute [its] own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. At the Court of Appeals level, we view the question of whether an IEP is adequate and appropriate as a mixed question of law and fact, and thus review the district court's ultimate determination *de novo*. But in the absence of a mistake of law, the district court's answer to this mixed fact/law question is only reviewable for clear error. See *Roland M. v. Concord School Comm.*, 910 F.2d 983, 990-991 (1st Cir. 1990), certiorari denied, 111 S.Ct. 1122; *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176, 181 (3rd Cir. 1986), certiorari denied, 479 U.S. 825. In this

appeal, the school district bears the burden of proof as the party challenging the outcome of the state administrative hearings. See *Karl v. Board of Education*, 736 F.2d 873, 877 (2nd Cir. 1984); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990).

The district court applied the correct legal standard in affirming the decision of the Level II hearing officer ordering Adam to be placed in a private day school rather than at BEC/Jack London. A school district has met the substantive requirements of the EHA if its proposed placement is reasonably calculated to be of educational benefit to the handicapped child. The district judge properly kept this question foremost in his mind, as had the hearing officers before him. He ultimately concurred in the opinions of the Level I and Level II hearing officers that Adam "*would not be able to satisfactorily obtain the required education benefits from the District's proposed placement* in light of the history of Adam's and his parents' relationship with the District." *Bd. of Educ. of Community Consolidated School Dist. 21 v. Ill. State Bd. of Educ.*, No. 90 C 3087 (N.D.Ill. Oct. 22, 1990) (memorandum opinion and order) (emphasis supplied). After finding that the BEC/Jack London placement would not be of sufficient educational benefit to Adam to meet the requirements of the EHA, the court considered the remaining options: private day placement and private residential placement. The court found explicitly that "placement in a private day-school facility is necessary at this time in order for Adam to obtain the educational benefit mandated by the [EHA]." *Id.* The court chose the day school option because it was the "least restrictive placement" from which Adam could receive educational benefit. See 20 U.S.C. § 1412(5) (expressing preference that "to the maximum extent appropriate," handicapped children not be removed from regular educational environment).

The school district argues that it was improper as a matter of law for the district court to consider the Brozers' hostility to the BEC/Jack London placement in analyzing the educational benefits which could be expected to flow

from that placement. This contention is incorrect. The sole legal requirement is that the IEP be designed to serve the educational interests of the child. The EHA does not limit the factors that can be considered in judging the likely impact of the IEP on the child so long as they bear on the question of expected educational benefits. In this case the district court made a factual finding that the parents' attitudes were severe enough to doom any attempt to educate Adam at BEC/Jack London. This finding had obvious and direct relevance to any assessment of the probable benefit to Adam of the BEC/Jack London placement. The court only considered the Brozers' attitude to the extent that it related to the ultimate question of whether the court could deem the BEC/Jack London placement to be "reasonably calculated" to supply educational benefit to Adam. The district court's factual findings were not clearly erroneous and it applied the proper legal standard to those facts.

The school district believes that our previous holding in *Lachman*, 852 F.2d at 290, precluded the district court from considering the Brozers' hostility to the school district's proposal. In *Lachman* we wrote that parents:

> do not have a right under the [EHA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.

Lachman, 852 F.2d at 297, citing *Rowley*, 458 U.S. at 207. The district contends that because Lachman found parental preference to be an invalid criterion by which to judge an IEP, we cannot allow any consideration of the Brozers' opposition to the BEC/Jack London placement in determining whether it passes muster under the EHA.

Lachman does not prevent any consideration of parental hostility. *Lachman* holds that a state-proposed IEP which meets the substantive requirements of the EHA cannot be defeated merely because the parents believe a better educational program exists for their child. *Lachman* involved a dispute between parents and a school dis-

trict over how best to educate a deaf child. The parents favored a "cued speech" methodology aimed at training the child to understand spoken language. The district recommended a "total communication" approach in which the child would have relied primarily on sign language. The district court explicitly found that the school district's proposed placement "had complied with the Act," 852 F.2d at 297, meaning that the total communication approach promised educational benefits to the child. In the face of this finding, the parents could not force adoption of what they perceived to be an even more effective educational program. *Id.*; accord *Roland M.*, 910 F.2d at 993 (issue is whether school district's IEP struck an adequate and appropriate balance, not whether better or worse program existed); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) (appropriate placement proposed by school district must be upheld even if family prefers another alternative). The school district had done all that the EHA required.

In this case, unlike *Lachman*, the district court and the hearing officers found that the school district's proposal simply would not meet the EHA requirement that the IEP be calculated to benefit Adam, because Adam's parents had already "poisoned" the option in Adam's mind. The district judge did not elect one alternative over another viable alternative based on the parents' preferences. The school district's proposed IEP was not acceptable or appropriate under the EHA, because the state of relations between the Brozers and the Board guaranteed its failure. Once it found that the district-proposed IEP would not benefit Adam, the court could not order its implementation under the EHA.

Lachman aside,[4] the district's larger point is well taken. Allowing a consideration of parental hostility to a state-

[4] The other cases cited by the school district are inapposite. *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15 (10th Cir. 1985), and *Roland M. v. Concord School Comm.*, 910 F.2d 983 (1st Cir. 1990),

(Footnote continued on following page)

proposed IEP to the extent that it limits the IEP's benefit to the child will result at times in the rejection of the school district's proposal simply because the parents, perhaps irrationally, oppose it. The plaintiff school district here exhorts us not to adopt a position that will "reward" parents for aberrant or distasteful behavior. Under the EHA, however, our concern is not rewarding or punishing parents. The appropriate concern is finding a program which will be of educational benefit to the child. Were we to adopt the school district's position and hold that parental attitudes can never be considered even if they have impaired the workability of the IEP for the child, this would in effect be punishing children for the actions of their parents. A child whose parents oppose an IEP so vehemently and vocally as to "doom" its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to "discipline" parents. The EHA makes clear whose interest must be paramount.

Moreover, we do not share the school district's concern that under our ruling parents will be able to feign opposition to obtain their preferred placement. Our ruling does nothing to alter the ability of hearing officers to make credibility determinations in the first instance. Hearing officers are best positioned to assess whether a family's

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[4] *continued*

deal with the circumstances under which parents' actions may disqualify them from challenging the state's compliance with procedural requirements of the EHA. *Doe v. Defendants I*, 898 F.2d 1186 (6th Cir. 1990), merely emphasizes that an IEP is evaluated prospectively and not in hindsight under the EHA. An IEP reasonably calculated to benefit the child cannot later be deemed inappropriate simply because of attempts by the parents after implementation to thwart its success. *Doe* says nothing about a case in which parental opposition is anticipated at the outset to make benefits to the child impossible. *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988), holds that parents cannot complain about the substantive adequacy of an IEP if they remove their child from the school district without requesting an IEP.

hostility is manufactured or whether parental attitudes pose a real threat to the success of the proposed IEP. Their findings are thus entitled to "due weight" by a district court on appeal. Under the regime established by the EHA, the district courts also retain the ability to test the parents' sincerity if it remains a viable issue on appeal to federal court, for they are allowed to hear additional evidence at either party's request. See 20 U.S.C. § 1415(e)(2). This Court is obligated to give any factual finding that emerges from this process deferential "clear error" review, whether the district court finds that the parents' obstructionist attitude will have little real effect on the child's education or, as in this case, that the parents' hostility is so entrenched as to preclude hopes for the proposed IEP.[5]

We conclude that it is permissible to consider parental hostility to an IEP as part of the prospective evaluation required by the EHA of the placement's expected educational benefits. If the facts show that the parents are so opposed to a placement as to undermine its value to the child, there is no obligation under the EHA to order the placement. The district court rightly held that the BEC/Jack London placement did not meet the substantive standard set by the EHA and that the IEP ordered by the

[5] The dissent simplifies the disagreement in this case by characterizing it as one "between parents and the school district," see *infra* at 13, implying that the district judge and the majority here have sided with the parents and wholly against "school authorities." *Id.* The Illinois State Board of Education is a defendant here with the Brozers. It is worth reiterating that two educational authorities, the hearing officers employed and trained by the Illinois State Board of Education to preside over administrative appeals, see Ill. Rev. Stat. ch. 122 ¶ 14-8.02(g), found the proposed IEP incapable of conferring educational benefits prior to the district judge's ruling, and that we and the district judge have come to the same conclusion partly in deference to that finding and their expertise.

Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam.[6]

The judgment of the district court is affirmed.

WOOD, JR., *Circuit Judge*, dissenting. The majority opinion fairly sets forth the problem in this case, but I respectfully differ as to the result reached, and would reverse.

The Brozers, parents of Adam, have succeeded in dictating the educational result by their continued and extremely hostile attitude toward the plaintiff district board and its efforts in behalf of Adam. The district board is primarily responsible for Adam's development and education. The Brozers have been more disruptive of the educational process than has Adam, but Adam has serious problems that require and deserve specialized attention. Parents' concern for their children is, of course, understandable, commendable, and important and ordinarily deserves consideration by school authorities. In this case, however, parental involvement and obstruction have exceeded all reasonable bounds. There is no basis whatsoever to default the good faith and competent professional efforts and recommendations of plaintiff designed to serve the best educational interests of Adam. There is not the slightest evidence of any legal or educational failure by plaintiff. There is not the slightest evidence that its proposed placement for Adam was improper or would not have met the goals and objectives under the applicable laws.

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[6] The propriety of Adam's temporary private day placement in the Jeanne Schultz Memorial School in Park Ridge, Illinois, pending the resolution of this appeal is not at issue and we express no opinion thereon.

The majority reminds judges that we are not trained educators. We are not trained, however, in many things that we must pass on in some respect, but we need not be. I do not need to be a professional educator to see that educational decisions and responsibilities have been improperly surrendered to the Brozers who are not trained educators either. The plaintiff has carefully, considerately, and professionally sought to aid Adam only to be thwarted by the Brozers.[1] If the parents had not so vehemently and continually obstructed their child's special education there might be much less of an educational or behavioral problem now.

The requirements of *Board of Education v. Rowley*, 458 U.S. 176 (1982), were fully satisfied by plaintiff. The necessary procedures were followed and the individual educational programs developed by plaintiff for Adam were reasonably calculated to enable Adam to receive educational benefits. Those programs should have been given a chance. The Brozers, as it is, have been allowed what is in effect an absolute veto over the plaintiff's proposed educational program. I would follow the general principles we set forth in *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988), another case in which there was a disagreement between parents and the school district. The parents in this present case have carried parental involvement to an extreme far beyond all reasonable bounds. To approve of this unreasonable parental interference will precedentially cause school authorities additional future problems they do not need.

The Brozers should have stepped aside and supported, not disrupted, plaintiff's careful efforts for their child's education. By their unreasonable interference and obstruc-

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[1] One hearing officer made a factual finding that in the recent past the Brozers had temporarily rewarded their disturbed son for something he had done by giving him a gun.

tion the Brozers have gained control over the educational process. The majority approves, but I cannot.[2] I respectfully dissent.

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[2] In view of footnote 5 of the majority opinion some clarification is needed.

The defendant Illinois State Board of Education filed an answer in the district court in which to the substantive issues it pleaded either lack of personal knowledge, or it deferred to the administrative record. However, in an affirmative defense the state board alleges its only obligation is to appoint an impartial hearing officer, which it did. The state board also explicitly alleges that it has "no interest or position regarding the merits or the underlying dispute between the parties." It appears the state board also views this controversy as one between the district and the parents. In this court the state board did not file a brief or appear at oral argument nor did the Level II hearing officer, Douglas C. Cannon, also named as a defendant. This is an appeal by the plaintiff district from the decision of the Level II hearing officer, Mr. Cannon, who deferred to the Brozers. So it is that I view this case in reality as a case between the Brozers and the district board regardless of whom plaintiff named as defendants.

The Level II hearing officer stated that he could "in no way condone the parents' conduct in this matter which can be described at best as being obstructionist and undermining the efforts of the School District to assist their son," and further he found that the school district's proposed placement has been "poisoned" in the mind of the student by his parents. The Level II hearing officer also had his own problems with Mrs. Brozer as she expressed her displeasure at any adverse evidentiary ruling made against her counsel, and had to be admonished. That admonishment only reduced but did not eliminate the problem. The hearing officer characterized the Brozers as having a "siege" mentality which in no way could be charged to the district. However, the hearing officer unfortunately then went ahead and based his decision on the conduct of the Brozers. He did urge them to work with Adam's educators, not against them. It was, he said, their "last chance."

My only point is that the continually excessive obstructive conduct of the Brozers is not a valid reason to give in and do it their way. The district court carefully looked at and analyzed this difficult and unfortunate problem. I only differ with the result reached for the reason given. The district board, the hearing officers, the district court, and I all agree it was the parents' objectionable conduct which has forced this result. I simply would not approve

(Footnote continued on following page)

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] *continued*

of parental conduct as a legitimate basis for it. The district's careful plan should have been tried, but since that is not to be I hope that what is to be done for Adam will prove to be just what he educationally needs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: July 23, 1991

BEFORE: Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Joel M. Flaum, Circuit Judge

No. 90-3599

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS,

Plaintiff-Appellant

v.

ILLINOIS STATE BOARD OF EDUCATION, DOUGLAS C. CANNON and SHELDON BROZER, on behalf of ADAM BROZER et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 90 C 3087, Judge George W. Lindberg

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 1991

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS,

Plaintiff-Appellant,

No. 90-3599 v.

ILLINOIS STATE BOARD OF EDUCATION, DOUGLAS C. CANNON and SHELDON and PAULINE BROZER on behalf of ADAM BROZER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3087—George W. Lindberg, *Judge*.

ORDER

On consideration of the petition for hearing and suggestion for rehearing en banc, no active judge has voted in favor of a rehearing en banc and the panel has voted to deny the petition for rehearing. Therefore the petition for rehearing is hereby denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

BOARD OF EDUCATION

v. Case Number: 90 C 3087

IL STATE BOARD OF EDUCATION

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to x x x hearing before the Court. The issues have been x x x heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiff, affirming the order of the Level II hearing officer, Douglas C. Cannon, entered on May 7, 1990 pursuant to hearing held under 20 USC §1415(c). The parties are ordered to comply with paragraph 3 of the Level II order at pp. 11-12.

Date October 22, 1990

H. STUART CUNNINGHAM
Clerk

/s/ J. M. Patterson
(By) Deputy Clerk

[DATED OCTOBER 22, 1990]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS,

Plaintiff,

-VS-

ILLINOIS STATE BOARD OF EDUCATION, DOUGLAS C. CANNON, and SHELDON and PAULINE BROZER, on behalf of ADAM BROZER,

Defendants.

No. 90 C 3087—Judge George W. Lindberg

MEMORANDUM OPINION AND ORDER

Plaintiff, the Board of Education of Community Consolidated School District No. 21, Cook County, Illinois, (the "District"), brings this action pursuant to the Education of the Handicapped Children Act ("EHCA"), 20 USC § 1415(e)(2), and the Illinois School Code, Ill Rev Stat ch 122, ¶ 14-8.02(j) and requests reversal of a portion of the Level II Administrative Order which requires the District to place Adam Brozer in a private day school at public expense.

Plaintiff's complaint arises under the EHCA, 20 USC §§ 1401 *et seq*, which is a funding statute under which

states receive federal funds to assist them in providing educational services to the handicapped. Any state educational agency receiving funds under the EHCA must establish procedures whereby handicapped children and their parents may protect their rights to a "free appropriate education." 20 USC § 1415(a). The procedures required of state educational agencies are contained in 20 USC §§ 1412-1415. The relevant procedures in the State of Illinois are contained in the Illinois School Code, Ill Rev Stat ch 122 § 14-1.01 *et seq*, and regulations issued pursuant thereto which are contained in Title 23 of the Illinois Administrative Code. The State Board of Education, as the agency responsible for ensuring that educational services are provided to all eligible children (including handicapped) within the State, has issued various rules and regulations implementing the requisite procedures authorized by State statute which qualify the State to receive federal funds under the EHCA. *See* Ill Rev Stat ch 122, ¶¶ 2-3.76, 14-1.01 *et seq*; 23 Ill Admin Code § 226 ("special education"). These State administrative procedures parallel the requirements of the EHCA. Compare, e.g., 20 USC §§ 1401, 1415 with Ill Rev Stat ch 122, ¶¶ 14-1.02, 14-8.02.

The "free appropriate public education" required by the EHCA is tailored to the unique needs of the handicapped child by means of an "individualized educational program" ("IEP"). 20 USC § 1401 (18). The IEP is prepared through the input of qualified representatives of the local education agency (school district), the child's teacher, the child's parents or guardians, and where appropriate, the child. *See* 20 USC § 1401(19). The IEP is periodically reviewed and where appropriate revised. *See* 20 USC § 1414(a)(j), § 1413(a)(11).

In Illinois, these procedures are accomplished under Ill Rev Stat ch 122, ¶¶ 14-8.02(b) which requires development

of a case study for a child through a multidisciplinary staff conference ("MDC") whose report is then given to the parents or guardian. If the parents disagree with the report and recommendations they may obtain an independent evaluation and any disagreements are subject to resolution through a two-level administrative hearing process. *See* Ill Rev Stat ch 122, ¶¶ 14-8.02(g), (h). The two-level administrative review process is part of the procedures mandated by the EHCA. *See* 20 USC §§ 1415(b), (c).

The first-level hearing ("Level I") is an "impartial due process" hearing at which "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" may be resolved. 20 USC § 1415(b)(1)(E); *see also*, Ill Rev Stat ch 122, ¶ 14-8.02(g). The Level I (local ruling) may be appealed to the State educational agency which is obligated to provide procedures for an impartial review. 20 USC § 1415(c). This is known as the "Level II" hearing. The Level II hearing officer may take additional evidence where appropriate and is to render "an independent decision upon completion of review." 20 USC § 1415(c); *see also*, Ill Rev Stat ch 122, ¶ 14-8.02(h). A party aggrieved by the Level II hearing has a right to appeal this decision to a state court or federal district court, which can hear additional evidence, and basing its conclusion on a preponderance of the evidence, grant such relief as determined to be appropriate. 20 USC § 1415(e); *see also*, Ill Rev Stat ch 122, ¶ 14-8.02(j).

Since May of 1986, Adam Brozer has been classified as primarily "behavior disordered" as defined in 23 Ill Admin Code § 226.552(g). The District further contends that Adam is also "seriously emotionally disturbed" as defined

under federal law in 34 CFR § 300.5(8). The Brozers, Adam's parents, deny this federal classification and contend that although Adam is behavior disordered, he is not seriously emotionally disturbed but suffers from a "specific learning disability" as defined in 34 CFR § 500.5(9). Resolution of this dispute is not relevant to this action because the issue before this court is the proper educational placement of Adam, not the specific federal classification for his handicap. Additionally, although the Brozers have disputed whether Adam's primary handicap is behavior disorder or learning disability, all the expert opinions including those obtained by the Brozers in the course of the administrative proceedings establish that Adam suffers primarily from a behavior disorder in addition to learning disabilities. This was the finding of both hearing officers (ie., Level I and Level II) and is not an issue on appeal to this court.

In May 1986, the District recommended that Adam be placed in the Student Support Center (SSC) of the Kilmer School where Adam was enrolled. After initially objecting, the Brozers agreed and Adam was placed in an educational program run through the SSC at Kilmer.

From February 1987 through the 1988-89 school year Adam did moderately well, receiving grades in the "C" to "B" range. During the 1988-89 school year, Adam received extensive services for his behavior disorder from his classroom teacher in addition to weekly social work services. During the 1988-89 school year, although Adam was receiving good grades, his in-school behavior deteriorated. He became disruptive and at times, violent. The District became concerned about the availability of sufficient support services for Adam during his transition to the District's Holmes Junior High School. The District

recommended a more restrictive placement for the 1989-90 school year.

In February 1989, while Adam was still at Kilmer, a multidisciplinary staff conference ("MDC"), was held to review Adam's current placement and consider placement for Adam for the following year, which would be his first in junior high school. The MDC report lead the District to propose a more restrictive placement for Adam at the Behavior Education Center at Jack London School in Wheeling, Illinois (BEC/Jack London).

The MDC team met again in May 1989 to develop Adam's IEP. Again the District recommended BEC/Jack London instead of the Student Support Center and related services available at Holmes Junior High School. The Brozers objected and in deference to the parents' wishes the District agreed to place Adam in the SSC at Holmes Junior High School for the 1989-90 school year.

During the early part of the 1989-90 school year, Adam's behavior deteriorated further. His teacher described him as "out of control." Adam was also failing all of his first semester classes. Additionally, the Brozers withdrew their consent for Adam to be disciplined in school or to receive social work services. This interfered with the ability of Adam's teachers to teach Adam to be responsible for his disruptive behavior.

On November 11, 1989, the MDC team again met and recommended a more restrictive placement for Adam at the BEC/Jack London School because his current placement was not directly related nor currently meeting his educational needs. The parents refused to consent to this placement and the District instituted Level I administrative proceedings pursuant to 20 USC § 1415(b)(1)(E) and

Ill Rev Stat ch 122, ¶ 14-8.02(b) in order to finally determine Adam's appropriate educational placement.

Prior to the commencement of the Level I hearings, the Northwest Suburban Special Education Organization (NSSEO) conducted a case-study evaluation of Adam Brozer and concurred in the District's recommendation that Adam be placed at BEC/Jack London. The NSSEO is a consortium of public school districts which runs the BEC/Jack London School in order to provide educational classes and special services for handicapped children which cannot be adequately provided at a member district's own schools. BEC/Jack London is a public school run by the NSSEO and hires its own teachers.

The Level I hearing was held February 23 and 28, 1990. The District maintained that Adam was primarily behavior disordered and/or seriously emotionally disturbed, with learning disabilities as a secondary-handicapping condition. The District maintained that BEC/Jack London was the proper educational placement for Adam. The Brozers argued that Adam's primary handicap was a severe learning disability and that this handicap had been improperly addressed by the District and resulted in Adam being frustrated in learning and developing behavioral problems.

The Level I hearing officer found that Adam is a "Learning Disabled / Behavior Disordered - Seriously Emotionally Disturbed child and requires special education." (Level I Report at p. 10.) The Level I hearing officer also discussed the existence of an attention deficit disorder that was referenced in one of the District's psychological reports, but does not appear to specifically find such a disorder to exist. The Level I hearing officer agreed with the District and found Adam's current placement in the SSC at Holmes Junior High "not directly related to the

child's needs and the District is correct in seeking a more restrictive placement that will allow the child to achieve success and halt his current pattern of failure in school." (Level I Report at p. 11.)

The Level I hearing officer also made specific findings concerning the attitude of the parents towards the District's attempts to provide Adam an education and the difficulty of implementing various strategies for Adam caused by the parents' refusal to cooperate with the District and the parents' negative attitude towards the District, its schools and its teachers. (Level I Report at pp. 11-13.) The Level I hearing officer specifically found that the "parents have what appears to be irreconcilable differences with the District." (Level I Report at p. 13.)

The Level I hearing officer, apparently in reliance on the problems caused by the parents, recommended a more restrictive placement than that proposed by the District. The Level I hearing officer ordered Adam to be placed at ARDEN Shores Residential Education Facility, a private residential facility. Due to the long waiting list, Adam was ordered to be temporarily placed at BEC/Jack London with certain additional services to be added, after an interim IEP was developed. The Brozers appealed the Level I findings and orders pursuant to 20 USC 1415(c).

The Brozers did not appeal the Level I finding concerning the nature of Adam's handicapping conditions. The Brozers did appeal the findings as to the parents' negative attitudes toward the District and the school and the fact they communicated this opinion to Adam. They also appealed the finding of irreconcilable differences between themselves and the District. The Brozers also raised numerous procedural errors. Lastly, the Brozers appealed the finding and order concerning the need for a more re-

strictive placement at ARDEN Shores. The Brozers requested that the Level II officer reverse the Level I order and continue Adam in the SSC at Holmes Junior High or alternatively place Adam at ARDEN Shores on a day-school not residential basis. The District did not appeal the Level I findings or order.

The Level II hearing began April 16, 1990. Over the objection of the District, the Level II hearing officer ordered a medical evaluation to determine whether Adam suffered from attention deficit disorder as argued by Adam's parents. The evaluation found no attention deficit disorder. Also, over the District's objection, the hearing officer allowed a letter from Dr. Atlas, an expert obtained by the Brozers. Dr. Atlas agreed with the District and Level I findings that Adam's primarily handicap was a behavior disorder and that Adam needed a highly structured yet supportive educational setting which can give him individualized instruction. Dr. Atlas also opined that the proposed residential placement at ARDEN Shores would be detrimental to his relationship with his parents and further concluded that in light of the parents' negative attitude toward the District and its schools, "it is doubtful any program operated by the school would be successful at this point."

The District filed a brief at the Level II hearing in which it stated that although the Level I order requires a more restrictive placement than sought by the District, it is appropriate in light of the evidence adduced at the Level I hearing. (Brief of District at Level II hearing at p. 11.) The District referred to the Level I findings concerning the parents' failure to place limits on Adam and their failure to support the discipline procedures imposed by the District upon Adam as support for the need to

remove Adam from his home and place him in a residential facility. (Brief of District at Level II Learning at p. 11.) The District went on to cite other cases in which similar findings and orders of private placement were held appropriate. In short, the District decided not to appeal the Level I order and argued vigorously for its affirmance in the Level II hearings.

The Level II officer, in addition to his own findings, adopted as part of his own finding all the findings of the Level I officer except the Level I finding concerning irreconcilable differences between the parents and the District. As to this finding, while finding the preponderance of the evidence to indicate what appears to be irreconcilable differences, the Level II officer did not find this sufficient to support the Level I order of a private residential placement.

The Level II officer found no evidence to support so restrictive a placement and ordered private day-school placement be found for Adam within 30-minutes commuting time or ten miles from the nearest edge of the School District. *See* 20 USC § 1412(5) (to maximum extent appropriate, handicapped children should be educated with non-handicapped children, and/or not removed from regular educational environments unless nature of handicap and child's needs require.)

The District has appealed the Level II order to this Court pursuant to 20 USC § 1415(e)(2). A district court's review of a Level II hearing under the EHCA brought pursuant to 20 USC § 1415(e)(2) is twofold. *Board of Education of the Hendrick Hudson Central School District Board of Education, Westchester County v. Rowley,* 458 US 176, 102 S Ct 3034 (1982) ("Rowley"). First, has the State complied with the procedures set forth in the EHCA

and, second, is the IEP developed through these procedures reasonably calculated to enable the child to receive educational benefits? *Id* at 206-207, 102 S Ct at 3051. The EHCA provides that the district court shall receive the records of the administrative hearings, shall hear additional evidence if requested and, basing its decision on the preponderance of the evidence, grant such relief as the court determines is appropriate. 20 USC § 1415(e)(2). However, in light of the EHCA's policy of leaving the primary responsibility of formulating an appropriate educational strategy for a handicapped child to the state and local agencies, *see Rowley* at 207, 102 S Ct 3051, and in recognition that the courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy, *Rowley* at 208, 102 S Ct 3052; courts, although required to grant appropriate relief by a preponderance of the evidence, must give due weight to the results of the State administrative proceedings. *Lachman v. Illinois State Board of Education*, 852 F2d 290, 293 (7th Cir 1988).

Neither party has requested the taking of additional evidence, or currently contests the procedures involved in the administrative proceedings. Thus, the District's arguments and this court's review focus on the second-prong of review, i.e., the appropriate IEP for Adam. Specifically, what is the appropriate educational placement for Adam Brozer?

The District contests that part of the Level II order requiring a private as opposed to public day-school placement. The District argues that the Level II officer relied upon his finding of irreconcilable differences between the parents and the District in finding a private placement necessary and that such a finding and order is unsupported by any evidence. Additionally, the District argues

that the Level II officer relied upon an improper criterion, namely, parental preference in determining the appropriate placement for Adam. The District contends that their suggested placement at BEC/Jack London is the least restrictive appropriate placement based upon the evidence.

The Brozers argue that the District, by failing to appeal the Level I order which refused to find the BEC/Jack London placement appropriate, have waived any arguments before this court as to placement at BEC/Jack London. The Brozers also contend there is ample evidence to support the Level II hearing officer's findings and order.

The District counters the Brozers waiver arguments by stating that the District has consistently argued BEC/Jack London is the appropriate placement and that it is not raising new procedural or substantive matters and; therefore, waiver does not apply in the instant situation. Neither party's position on the application of waiver to the instant case is completely correct.

The court has no doubt that principles of waiver are applicable to this court's review under 20 USC § 1415(e). The allow a party to raise anew in the courts issues involved in determining the appropriate IEP of a handicapped child, when such issues were not disputed at prior administrative hearings, would interfere with the extensive procedural protections mandated by the EHCA, which were designed with the legislative conviction that adequate compliance with the EHCA's procedures would in most cases assure an appropriate IEP. *See Rowley*, 458 US at 206, 102 S Ct at 3050. What purpose would be served by the extensive and comprehensive procedures of the EHCA, if any specific act, finding, or order, not complained of or disputed at an earlier stage of the review process could be dredged up at the court level review pro-

vided for under 20 USC § 1415(e)(2)? Although a court is to review the administrative proceedings and order appropriate relief based upon a preponderance of the evidence, the court is required to give due weight to the results of the State administrative proceedings. *Lachman*, 852 F2d at 293 (and cases cited therein). If concepts of waiver are not applied, and a party can raise new issues, this would effectively defeat Congress' intent that the local and state educational agencies, not the courts, have the primary responsibility for formulating an appropriate educational program for a handicapped child through the extensive procedures mandated by the EHCA. *See Rowley* at 205-209, 102 S Ct at 3050-3052.

Additionally, waiver of issues not raised in prior administrative proceedings has been applied by federal courts sitting in review of administrative proceedings including those under the EHCA. *See Coe v. Michigan Dept. of Ed.*, 693 F2d 616, 618 (6th Cir 1982); *David D. v. Dartmouth School Committee*, 775 F2d 411 (1st Cir 1985); *Max M. v. Thompson*, 585 F Supp 317, 326 (N D Ill 1984). "Orderly procedure and good administration require objections to the proceedings of an administrative agency be made while it has an opportunity for correction in order to raise issues reviewable by the courts." *US v. Tucker*, 344 US 33, 37, 73 S Ct 67, 69 (1952).

Thus, to the extent the District did not appeal the Level I findings or orders and now attempts to contest certain findings or parts of the Level I order not altered by the Level II hearing, the District has waived its right to contest such findings or orders. The District is limited to contesting only those new findings or orders entered at the Level II hearing. However, the District's appeal is not as limited at the Brozers argue. The District is not limited to arguing only as to the appropriateness of the Level

II decision to alter the Level I order from private-residential to private day-school placement. The District, in fact, does not dispute the Level II finding that the residential placement is too restrictive. The District argues that the Level II order specifying private as opposed to public day-school placement is (1) insupportable based on the evidence; and, (2) the Level II officer improperly applied the EHCA by relying on parental preference in determining appropriate placement. Both of these arguments are directed at the Level II order which altered the Level I order and are, therefore, properly before this court.

As to the District's arguments concerning the lack of evidence of irreconcilable differences between the parents and the District and the Level II officer's reliance on parental preference, the court finds the District has mischaracterized the record. The Level II officer, similar to the Level I officer and in express adoption of the Level I findings, found the parents' attitudes and actions to have severely interfered with the District's attempts to provide Adam with an appropriate education. The Level II officer referenced the Level I record and transcripts as well as his own observations and stated "an extremely adversarial and distrustful relationship exists by the parents and the student toward the District" and the parents have adopted a "siege mentality." (Level II Report at pp. 5-6.) Both the Level I and Level II hearing officers as well as this court, after review of the record, find that the District has displayed good faith in all its dealings with the Brozers and are not responsible for the Brozers' or Adam's attitude toward the District. However, the Level II officer found the parents' state of mind likely to affect the success or failure of the District's proposed placement at BEC/Jack London. The Level II officer did not rely on the parents' preference for a private placement,

in fact, they wanted Adam to remain at Holmes Junior High School, a public school, albeit not a day school for handicapped children as proposed by the District. The Level II officer relied upon his belief that the nature of the parents' attitudes and relationships with the District and the fact such attitudes had been communicated to Adam, would defeat the effectiveness of a placement at BEC/Jack London. The factual basis for this finding existed in the Level I record as well as, specifically, in the Level I findings. The District cannot credibly argue, and has waived any argument at this stage, that the Level II officers' order based upon these findings is unsupported by any evidence, especially where the parents appealed part of these findings and the District argued in support of all the Level I findings at the Level II hearing.

The District also argues that the Level II officer's findings and conclusions discussed above were improperly based upon the letter of Dr. Atlas, offered by the parents and admitted by the Level II officer, over objections of the District. This argument deserves only minimal comment. Although the Level II officer discussed Dr. Atlas' opinions which concerned the Level II officer's conclusions, the Level II officer specifically stated that he had reached his similar conclusions before he reviewed Dr. Atlas' letter. The District's attorney conveniently fails to mention this and characterizes the record in her brief to this court in a way which implies that the Level II officer relied only on Dr. Atlas' letter for his findings concerning the parents' and Adam's problems with the District and that this letter formed the basis of the Level II order for private placement. This simply was not the case. Reliance, if any in fact occurred, by the Level II officer on Dr. Atlas' letter was harmless error in light of the preponderance of the evidence which supports both

the Level I and Level II findings concerning the negative attitudes of the parents toward the District and the fact such has been communicated to Adam and had seriously interfered with the District's attempts to educate Adam. These findings for the most part existed in the Level I findings which the District did not appeal and argued in support of at the Level II hearing.

The real issue remaining to be determined is whether the Level II officer could rely on the well-established facts concerning the parents' and Adam's negative attitudes towards the District's good-faith attempts at providing a free appropriate education to Adam in ordering a private, as opposed to public, day-school placement to be part of the free appropriate education to which Adam is entitled under the EHCA.

> The term "free appropriate public education" means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18) (emphasis added).
>
> "Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 1401(16). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17).

Rowley, 458 US at 187-188, 102 S Ct at 3041. The Supreme Court has interpreted a "free appropriate education" under the EHCA to consist of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Rowley* at 188-189, 102 S Ct 3042. The EHCA seeks to provide a "basic floor of opportunity" consisting of specialized instruction and related services which are individualized and designed to provide educational benefit to the handicapped child. *Rowley*, 458 US at 201, 102 S Ct at 3048. The EHCA does not require the State to educate a handicapped child to his or her highest potential. *See Rowley*, 458 US at 188-189, 102 S Ct 3042.

The EHCA envisions situations where the no cost special education necessary to provide a free appropriate education to a handicapped child under the EHCA will require placement of the child in a private school or facility at public expense. Participating states under the EHCA must submit plans that set forth policies and procedures to assure:

> (A) [T]hat, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary school, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and
>
> (B) that—
>
> > (i) *handicapped children in private schools and facilities will be provided special education and related services* (in conformance with an individualized education program as required by this subchapter) *at no cost to their parents or guardian, if such children are placed in or re-*

> *ferred to such schools of facilities by the State or appropriate local educational agency as a means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to handicapped children within such State*; and
>
> (ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

20 USC 1413(a)(4) (emphasis added).

Similarly, consistent with the EHCA requirements, the Illinois School Code states:

> The General Assembly [of Illinois] recognizes that non-public schools or special education facilities provide an important service in the educational system in Illinois. If because of his or her handicap the special education program of a district is unable to meet the needs of a child and the child attends a non-public school or special education facility . . . the school district in which the child is a resident shall pay the actual cost of tuition for special education and related services." Ill Rev Stat ch 122, ¶ 14-7.02.

Thus, a decision to order a private versus public placement must be based upon whether the competing placements are reasonably calculated to provide a basic floor of opportunity from which the child can be expected to benefit educationally. *Rowley*, 458 US at 203-204, 102 S Ct 3049. Only if both placements meet this requirement does the "mainstreaming" requirement of 20 USC § 1412(5), relied upon the District, come into play. *Lachman v. Illinois Board of Education*, 852 F2d 290,295 (and cases cited therein).

Section 1412(5) provides in relevant part:

> [T]o the maximum extent appropriate, handicapped children . . . are [to be] educated with children who are not handicapped, and that special classes, separate schooling, or removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and other services cannot be achieved satisfactorily. 20 USC § 1412(5).

This section which contains the EHCA policy in favor of "mainstreaming" has given rise to what courts have referred to as the "least restrictive placement" requirement. However, disputes over which of two placements is least restrictive only becomes relevant if both placements allow for the satisfactory education of the handicapped child. 20 USC § 1412(5); *Lachman*, 852 F2d at 295; *see also, Board of Education of East Windsor Regional School District v. Diamond*, 808 F2d 987, 991 (3rd Dist 1986).

It is clear in the instant case that both the Level I and the Level II hearing officers believed that Adam would not be able to satisfactorily obtain the required educational benefits from the District's proposed placement in light of the history of Adam's and his parents' relationship with the District. The Level I officer perceived this as so problematical that she ordered private-residential placement. The District, in support of the Level I order, stated the following in its brief to the Level II hearing officer: "[t]he education of [Adam] can only be effectuated if the parents are not involved on a continuous basis in second guessing and undermining the disciplinary efforts of the educators." The Level II officer, while agreeing that such a problem existed, found the least restrictive placement to be private day-school. In this way, the problems between the parents and the District could be mini-

mized, but the child could still benefit from his relationship with his parents while living in their home. The Level II officer warned the parents that this might be their "last chance." The District agrees with the Level II finding that residential placement is too restrictive at this time. The District only disagrees with private versus public day-school placement. The court agrees with the Level I and II officers that the parents' attitudes, which have been communicated to Adam, have seriously interfered with the ability of the District to provide Adam with an appropriate education in a public school.

The court wishes to emphasize that this is not a case involving parental preference for a private versus public school or a dispute over methodology. *See e.g., Lachman*, 852 F2d 294 (dispute over methodologies for educating hearing impaired students). The parents' and Adam's negative attitudes toward the District and its educational efforts developed over a period of years and arose out of the parents' belief that Adam's behavioral problems were caused by the District's failure to properly identify Adam's severe learning disability. The District consistently maintained, and all expert evaluations have verified, that Adam's handicapping condition is primarily a behavior disorder and only secondarily involves a learning disability. Not until the proceedings in this court have Adam's parents admitted the correctness of the District's position. The court hopes this admission represents actual acceptance by the parents of the nature of Adam's handicap and that the parents will exercise renewed good-faith efforts to cooperate with Adam's educators so that Adam may be mainstreamed as soon as appropriate. It would certainly be a disservice to Adam if the parents' problems ultimately result in the need to remove Adam from his home in order for him to obtain an education as proposed by the Level I hearing officer.

Giving due weight to the prior administrative proceedings in this case, the court finds a preponderance of the evidence supports the Level II hearing officer's conclusion that placement in a private day-school facility is necessary at this time in order for Adam to obtain the educational benefit mandated by the EHCA. Thus, the court agrees with the Level II order and finds it appropriate in all respects and specifically orders that an Individualized Educational Plan as outlined in paragraph 3 of the Level II order at pp. 11-12 be developed within the time constraints prescribed therein.

Lastly, in their answer to the District's complaint in this action, the Brozers request that they be awarded attorney's fees incurred in this court. The EHCA authorizes a court in its discretion to award reasonable attorney's fees to the parents of a handicapped child or youth who is the prevailing party. 20 USC § 1415(e)(B). The Brozers, on behalf of Adam Brozer, are the prevailing parties in this action before the court. They have successfully defended the District's attempts to alter the Level II order. While the Brozers were not the prevailing party at either of the administrative levels and were substantially responsible for the drawn-out nature of events, they were prepared to accept the Level II order and comply with its terms. It was the District's decision to appeal the Level II order which caused the proceedings in this court. While the District has at all times exercised good faith and complied with the procedural mandates of the EHCA at all levels, these are not grounds to deny the Brozers their reasonable attorney's fees pursuant to the EHCA. In light of the limited nature of the proceedings in this court, which involved resolution of issues by way of legal briefs only, the court does not expect the requested fees to be large. While not meaning to imply that defendants' coun-

sel will submit an excessive fee request, the court is concerned with the now-too-common practice of inflating fee requests well beyond what an attorney would ask a client to pay when the opposing side is liable for fees. The court wishes to draw attention to the Supreme Court's statement in *Hensley v. Eckerhart*, 461 US 424, 434, 103 S Ct 1933, 1939. "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission [to his client]." *Id.*

ORDERED: The Clerk of the Court is directed to enter a Rule 58 Judgment Order in favor of the defendants and against the plaintiff affirming the order of the Level II hearing officer, Douglas C. Cannon, entered on May 7, 1990 pursuant to hearing held under 20 USC § 1415(c).

The parties are ordered to comply with paragraph 3 of the Level II order at pp. 11-12. If there are problems in implementing this order, the parties are to contact the court as soon as possible to arrange a hearing so that Adam Brozer will be appropriately placed as soon as possible.

The Brozers are directed to submit a petition for fees pursuant to 20 USC § 1415(e)(B) on or before November 7, 1990. Plaintiff shall file a response or inform the court that it does not object to the fee request on or before November 14, 1990. A reply, if any, is due on November 21, 1990.

/s/ George W. Lindberg
United States District Judge

Date: Oct. 22, 1990

ILLINOIS STATE BOARD OF EDUCATION

IN THE MATTER OF: ADAM BROZER	)	May 7, 1990 DOUGLAS C. CANNON LEVEL II HEARING OFFICER
and	)	
WHEELING COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. #21	)	CASE NO: 90-506

LEVEL II HEARING OFFICER'S DECISION AND ORDER

On March 8, 1990, the Level I Hearing Officer issued her Decision and Order after a hearing that had been conducted over two days and which resulted in a transcript of 490 pages and approximately 555 pages of records. On March 30, 1990, this Hearing Officer was appointed, and on April 3, 1990, contacted the parties regarding the scheduling of the Level II Hearing. The attorney for the School District was on vacation, but her secretary indicated that April 16, 1990 appeared to be available for the Hearing. The attorney for the student agreed to the April 16, 1990 date and the Hearing was accordingly scheduled at that time.

On April 16, 1990, the Hearing was continued by Motion of the student's attorney and certain preliminary matters were addressed. The attorney for the student presented his Motion for Default for the failure of the School District to file the complete Level I record within ten (10) days as provided by regulation. The Hearing Officer, after argument, denied the Motion for Default, but allowed the student certain alternative relief, that being that a neuro-

logical examination be conducted at School District expense to determine whether the student's handicapping condition included Attention Deficite Disorder (ADD). This had been previously requested at the Level I Hearing and denied by that Hearing Officer.

The Level II Hearing Officer also disclosed to the parties that he is a resident of Elementary School District 15 and High School District 211. Both of these School Districts belong to the same Special Education Cooperative as does Wheeling Community Consolidated School District No. 21. It was further disclosed that two of his children have in the past been determined to be eligible to receive special education services, although neither has ever dealt with any employee of the "coop" to the knowledge of the Hearing Officer.

The Hearing Officer advised the parties that none of the foregoing would seem to disqualify him from serving as Hearing Officer, and that he was confident that he could be impartial. Attorney for the student requested that the Hearing Officer recluse [sic] himself. While initially inclined to grant that request, after hearing the School District's objections, which centered upon the delay that would be encountered if another Hearing Officer had to be appointed, the Motion was denied.

An Oral Motion was made by the School District's attorney pursuant to Section 226.684 that the Hearing Officer change the student's placement until the conclusion of the Level II Hearing and any appeals thereafter. The Hearing Officer reviewed the regulation in question, and directed that any such request be made to the State Superintendent as provided by said regulation. In order to avoid the necessity of another appearance, the testimony of witness AVRUM POSTER, the principal of Holmes School was heard. Further, Parent's Group, Exhibit 1, being certain

documents which were not allowed into evidence at the Level I hearing (indeed, attorney for the student was even denied the opportunity to make an offer of proof) was allowed into evidence. The Hearing was then continued to April 30, 1990.

On April 30, 1990, the Hearing was reconvened at 9:30 a.m. Two additional Exhibits were introduced into evidence at that time. Parent's Exhibit #2, the written report of Howard Atlas, Ed. D, was admitted into evidence over the objection of the attorney for the School District. School District's Exhibit #1, the report of Steven B. Abern was admitted with no objection. The oral arguments of both parties was [sic] heard, and the Hearing closed.

That afternoon, the Hearing Officer spoke with both attorney's [sic] via conference call, and requested that he be provided with the names of private day schools other than Arden Shores that have services comparable to those being proposed for the student at the Behavior Education Center/Jack London School. (The parent's [sic] had objected to an Arden Shores day placement as being too distant and requiring too much commuting time.) Attorney for the School District objected to this request as introducing evidence after the close of the Hearing. Attorney for the student agreed to provide the School District and the Hearing Officer with the names of any such placements agreeable to the parties.

Pursuant to agreement of counsel at the conclusion of the Hearing, the Hearing Officer's report and order was [sic] to be mailed on or before May 7, 1990.

HISTORY

This student's history seems to not be in issue, and accordingly will be summarized briefly from the Level I

transcript, written record and Hearing Officers Report. The child was first identified as Learning Handicapped in 1982, and was reevaluated in May 1986, at which time he was reclassified as Behavior Disorder/Learning Disabled. The parent's [sic] refused the placement recommendation at that time, and the District acquiesced. Nine months later, after a number of unfortunate experiences for the child, the parents agreed that the child participate in the Intermediate Student Support Center program at Kilmer School as had been previously requested by the District. The student was also to receive one hour a week of social service related services, but this was subsequently terminated by the parents.

During his 2½ years in said placement, the child experienced increasing problems in unstructured settings in the school. He continued to progress academically however, with grades in the C to B range. For the beginning of the 1989-1990 school year, the student continued in a S.S.C. placement at Holmes Junior High. His teacher of the prior 2½ years became his teacher again at Holmes in November 1989 at the request of the parents. Behavior problems had escalated throughout his tenure at Holmes, and academic progress had effectively ceased. The parents continued to refuse social support services. Discipline has been severely hampered by restrictions imposed by the parents.

As reflected throughout the written record and the Level I transcript, as well as observed by the Hearing Officer at the Level II Hearings, an extremely adversarial and distrustful relationship exists by the parents and student toward the School District. Conduct of the mother of the student was noted by this Hearing Officer during the first Hearing session expressing her displeasure to any evidentiary ruling against her counsel. Said conduct

was duly admonished by the Hearing Officer, and not repeated at least to the extent previous to the admonishment. Said incident, however, only goes to demonstrate the subjective state of mind of the parents as to the adversarial or "siege" mentality that now exists. The Hearing Officer in no way wishes to suggest that this state of mind of the parents was in any way, shape or manner brought about by any improper conduct of the School District.

Indeed, as noted by the Level I Hearing report and order the evidence shows that the District has displayed good faith in all its dealings in this matter, and the child's right [sic] have been fully observed by the District. Any procedural errors were *de minimis*. This Hearing Officer strongly agrees.

However, this Hearing Officer must note the state of mind of the parents as a fact likely to effect the success or failure of the District's proposed placement at Jack London School. While not stated in so many words, the Level I Hearing Officer's decision is also clearly based upon this attitude that has arisen with the parents and the student.

LEVEL I HEARING

The Level I Hearing was requested by the School District to change the student's placement to the Jack London/Behavior Education Center. The parents, represented by the same attorney that represented them before this Hearing Officer, opposed this change in placement, asserted that their child was primarily L.D. who had been provided with inappropriate and inadequate services, and that their child has Attention Deficit Disorder, which was interfering with his educational progress. The Level I Hear-

ing Officer found the issues in favor of the School District, and ordered that the student be placed in a *residential* placement, together with certain other relief. From this order the parents, but not the School District, appealed.

FINDINGS OF FACT/CONCLUSIONS OF LAW

Much of the additional evidence provided at the Level II Hearing was of questionable value. Parent's Exhibit #1, being those documents the Level I Hearing Officer refused to allow into evidence, or even refused an offer of proof regarding, proved to be ambiguous at best. The testimony of witness Avrum Poster was directed toward the issue of interim placement which is not properly before this Hearing Officer. The medical report of Dr. Abern (as ordered by this Hearing Officer) which was the School District's Exhibit 1, was significant, since it ruled out the parent's concern that their son had ADD which had not been noted by the District in its evaluation. The testimony of Greg Best was significant, although a little redundant to the Level I testimony. He confirmed that the conclusions of Dr. Atlas (Parent's Exhibit II) agree with those of the School District. There was some difficulty with the doctor's use of the term "conduct disordered", but this is no doubt due to a misunderstanding on the doctor's part. Conduct Disordered as explained by Mr. Best, refers to an active mental illness (i.e. manic-depressive or schizophrenia) as opposed to the behavior disordered placement sought by the District.

Two aspects of Dr. Atlas's report are specifically noted by the Hearing Officer. It should be noted that this Hearing Officer had reached the same conclusions after he had completed his review of the Level I Hearing but *before* he had seen the report of Dr. Atlas. First, Dr. Atlas notes

that a "residential placement is not the least restrictive environment for the student." Second, he notes that "considering the negative attitude the parents hold towards the school system, which has in turn helped to foster Adam's attitude, it is doubtful if any program operated by the school would be successful at this time."

As to the first point, there is absolutely no evidence to support the Level I Hearing Officer's conclusion that a residential placement is the least restrictive environment that would satisfy the student's unique educational needs. The witnesses of the School District supported the Jack London placement. The parents and their witness supported an even less restrictive L.D. placement. Nowhere in my review did I discover any educator's or expert's opinion that a residential placement was the least restrictive placement necessary to further the student's education.

As to Dr. Atlas's second point noted above, this Hearing Officer, would agree, as apparently did the Level I Hearing Officer. Indeed, in this Hearing Officer's opinion, no other explanation can be given to the order for residential placement other than it was the opinion of the Level I Hearing Officer that the parents were so impeding their child's educational progress as to require that he be removed from the home setting. This Hearing Officer can in no way condone the parent's conduct in this matter, which can be described at best as being obstructionist and undermining the efforts of the School District to assist their son. However, this Hearing Officer must note, as a parent, that where ones [sic] child is concerned, it is very, very, difficult to respond intellectually rather than emotionally. Instinctively, when a child is threatened, as no doubt these parents see their child being "threatened" by the School District, a parent rushes to the defense.

Unfortunately, that point where emotion ebbs, and intellect once again reigns, seems unlikely to be reached in the foreseeable future in this matter.

The School District's proposed placement has been "poisoned" in the mind of the student. The student was aware that his parents would not support the efforts of the School District to control his behavior at Holmes School, which doomed that placement to failure. He is likewise aware of their opposition to the Jack London placement, and the Hearing Officer sees no reason to expect that that placement will be successful without parental cooperation.

What is needed here is an opportunity for the parents to start anew, to work with their child's educators rather than against them. At this point that can only be achieved through a private day placement. The parents must recognize that this may well be their "last chance." Clearly the Level I Hearing Officer felt so strongly about the negative effect the conduct of the parents was having on their son's education as to order the residential placement. Equally clear is the fact that should the private day placement fail, the next placement proposed undoubtedly will be a residential placement. Fortunately, both the School District and the parents will have the same interest in seeing that the private day placement succeeds.

ORDER

1) This Hearing Officer specifically affirms and adopts as his own the Findings of Fact/Conclusions of Law of the Level I Hearing Officer as set forth on pages 9 through 13 of that decision, except for paragraph 4(g) found on page 13. While a preponderance of the evidence does establish that the parents have what appear to be

irreconcilable differences with the District, there has not been a showing in this cause that the most restrictive placement of a residential placement is required at this time.

The Hearing Officer specifically affirms paragraph 2 on pages 10-11, paragraph 4 on page 11, paragraph 4 f on pages 12 and 13 and paragraph 5 on page 13 as identified in the Notice of Appeal by the attorney for the student.

2) As no appeal was taken from paragraphs 6 and 7 of the Level I Order, and no new evidence was elicited, those paragraphs are affirmed.

3) Within fourteen (14) days of this order, the School District shall convene a multidisciplinary conference to develop an Individual Education Plan. Said plan shall include:

a. Referral of the student to a private day school located within thirty minutes commuting time (or ten miles from the nearest edge of the School District boundaries should the parties disagree) that meets with the student's educational needs as determined by the conference including representatives of the proposed private day placement.

b. Weekly participation by the parents.

c. Related services as determined to be necessary.

d. Development of specific behavior guidelines and loss of resultant privileges as consequences for inappropriate behavior as suggested the parents:

----no T.V.

----staying in after school

----no Nintendo

----no Karate

The private day school staff shall develop with the parents a system of communication to advise the parents of which, if any, of these restrictions need to be imposed at home *based on the child's functioning at school.*

e. The child shall have the opportunity to continue to participate in his current Karate activities after school so long as he meets staff designed behavioral criteria at school.

4) The private day school placement as designated in this Order shall be achieved no later than thirty (30) days after the date of this Order. However, the parties may agree *in writing* to delay implementation of the placement until the beginning of the 1990-1991 school year if the I E P does not require a summer program for the student.

5) The School District is designated the prevailing party of this Special Education Hearing and Appeal, should a court be called upon to determine the appropriateness of a petition for attorney fees.

APPEAL INSTRUCTIONS

If either party disagrees with this decision, they may, within 120 days after a copy of this decision is mailed to the party, bring a Civil Action within any Circuit Court of competent jurisdiction. Such action shall operate as a supercedes, [sic] and shall not be exclusive of any right or causes of action otherwise available.

/s/ DOUGLAS C. CANNON
DOUGLAS C. CANNON
LEVEL II HEARING OFFICER
MAY 7, 1990

PROOF OF SERVICE

The undersigned certifies that a true and correct copy of the attached Order has been served upon the following by the method indicated herein, pursuant to Supreme Court Rules 11 and 12.

__ By delivery to the below-named attorney or party personally.

__ By leaving it in the office of the below-named person, the attorney of record, with his or her clerk or with a person in charge thereof.

__ By leaving it at the residence of the below-named person, a party hereto, with some person of the family of the age of 13 years or upwards.

X By depositing it in a United States Post Office or post office box, enclosed in an envelope, plainly addressed to the below-named persons at the address indicated, with postage fully prepaid by certified mail return receipt requested.

The undersigned certifies that such service was made on the 7th day of May 1990.

/s/ DOUGLAS C. CANNON
DOUGLAS C. CANNON
HEARING OFFICER

Mr. & Mrs. Sheldon Brozer
544 Wynn Court
Wheeling, Illinois 60090

Mr. Lloyd DesCharpentrie, Superintendent
Mr. Gerald Kiffel, Assistant Superintendent
Consolidated Community School District 21/N.S.S.E.C.
999 West Dundee
Wheeling, Illinois 60090

Mr. Michael Gerstein
520 North Michigan Ave.
Suite 824
Chicago, Illinois 60611

Ms. Fay Hartog-Rapp
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe
Suite 4200
Chicago, Illinois 60603

ILLINOIS STATE BOARD OF EDUCATION

IN THE MATTER OF: ADAM BROZER and WHEELING COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21	)))))))	MARCH 8, 1990 MARGIE BEST LEVEL I HEARING OFFICER

LEVEL I HEARING OFFICER'S
DECISION AND ORDER

SENT CERTIFIED MAIL TO ALL PARTIES
LEVEL I IMPARTIAL DUE PROCESS HEARING

DATE: March 8, 1990

MARGIE BEST,
LEVEL I HEARING OFFICER
1649 B North Burling
Chicago, Illinois 60614

Mr. and Mrs. Sheldon Brozer
544 Wynn Court
Wheeling, Illinois 60090

Mr. Lloyd DesCharpentrie, Superintendent
Mr. Gerald Kiffel, Assistant Superintendent
Consolidated Community School District 21/N.S.S.E.O.
999 West Dundee
Wheeling, Illinois 60090

Mr. Michael Gerstein
Attorney for Adam Brozer and
Mr. and Mrs. Brozer
520 North Michigan Avenue
Suite 824
Chicago, Illinois 60611

Ms. Fay Hartog-Rapp
Attorney for District
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe
Suite 4200
Chicago, Illinois 60603

STUDENT: Adam Brozer, D.O.B. 9-30-76

Dear Mr. and Mrs. Brozer, Mr. DesCharpentrie, Mr. Kiffel, Mr. Gerstein and Ms. Hartog-Rapp:

On February 23, 1990 and on February 28, 1990, a Level I Impartial Due Process Hearing was convened on behalf of Adam Brozer at the Administrative Offices of District 21 at 999 West Dundee, Wheeling, Illinois. The Level I Hearing Officer has jurisdiction to hear and decide this matter under Section 14-0.02(g) [sic] of *The School Code of Illinois*, 34 C.F.R. 300.506-509 of the P.L. 94-142 regulations and 23 Illinois Administrative Code 226 Subpart J. This Hearing process also meets the District's responsibilities under Section 504 of the Rehabilitation Act of 1973, as enforced by the United States Department of Education, Office for Civil Rights; specifically, Title 34, Section 104.

The parties were informed of their pre-Hearing and Hearing rights and responsibilities under Section 14-8.02(g) of *The School Code of Illinois*, 34 C.F.R. 300.508, and 23 Illinois Administrative Code 226 Subpart J.

I. HEARING INFORMATION:

A. *MOVING PARTY*: The District is the moving party, having requested this Hearing in correspondence received at the Illinois State Board of Education on November 27, 1989.

B. *ISSUE(S)*: The District requested this Hearing to seek a Hearing Order to place Adam in a more restrictive placement at the Behavior Education Center/Jack London School despite parents' disagreement with the proposed placement.

This was the only issue identified in the Hearing request. Other related issues were raised by the parties and have been considered in the context of their impact on the central issue of placement.

C. *BURDEN OF PROOF*: The District has the Burden of Proof.

D. *STANDARD OF PROOF*: The standard is preponderance of the evidence.

II. PRE-HEARING ACTIVITIES

A. *TIMELINES AND SCHEDULING*: The Hearing was not held and the Decision not mailed within the 45 day timelines mandated by 34 C.F.R. 300-512 because of the following circumstances:

1. The Hearing was requested by the District on ISBE Form 19-86, with a copy of the Hearing Request mailed by certified and regular mail to the parents on November 20, 1989 (Doc. D.23-24).
2. The Request was received at the Illinois State Board of Education on November 27, 1989 (Addendum #2) and a list of potential Hearing Officers was mailed to the parties on November 30, 1989 (Doc. D.25-34).
3. On December 5, 1989 the District wrote to the parents requesting that they call to com-

plete the selection process and invited contact regarding any questions about the procedure (Doc. D.35).

4. On December 11, 1989 the District confirmed in a letter to the parents sent regular and certified mail, that because the parents were seeking legal counsel, a few extra days would be allowed to jointly select a hearing officer. The District would select the Hearing Officer on December 14, 1989 if the parents failed to respond (Doc. D.36).

5. On December 15, 1989 the District wrote to I.S.B.E. informing the Supervisor of Procedural Safeguards that parents' attorney informed the District that the selection process could not proceed because he was protesting the original list of names (Doc. D.37). On December 15, 1989 the parents' attorney wrote to the District confirming his discussion regarding objection to the list. He further requested specific involvement of the N.S.S.E.O. Cooperative and its Director (Doc. D.38).

6. On December 15, 1989 parents' attorney did write to the I.S.B.E. Supervisor of Procedural Safeguards to explain his concerns with the list of hearing officers and to ensure the involvement of N.S.S.E.O. and its Director (Doc. D.40-41).

7. On December 21, 1989 the I.S.B.E. Supervisor of Procedural Safeguards wrote to the parents' attorney, with copies to the parents, the District Superintendent and the N.S.S.E.O. Director (Doc. D.42-43). In the letter, the professional credentials and positions of the Hearing Officers in question were explained and verified by the Supervisor from I.S.B.E.

8. On December 26, 1989, parents' attorney confirmed his receipt of the I.S.B.E. response and his attempts to contact the District to complete the selection process (Doc. D.44).

9. On January 3, 1990, the selection was completed and the report mailed to the parents' attorney for signature (Doc. D.45-46).

10. On January 8, 1990, the District wrote to the parents' attorney confirming that N.S.S.E.O. would be completing evaluation components and attaching a permission form (Doc. D.47-48).

11. On January 11, 1990, I.S.B.E. notified the Hearing Officer and the parties of the assignment (Addendum #3). On January 17, 1990 this letter was received by the Hearing Officer who began on that date to call the parties to schedule the Hearing. The Hearing was initially scheduled for January 29, 1990, but before written confirmation could be drafted, parents' attorney requested a postponement pending completion of the N.S.S.E.O. evaluation (Addendum #4).

12. With the District's agreement, the Hearing was rescheduled for February 16, 1990 and a letter of confirmation was sent by the Hearing Officer to the parties and I.S.B.E. on January 23, 1990 (Addendum #5). I.S.B.E. confirmed to the parties on January 31, 1990 (Addendum #6). The District confirmed on January 26, 1990 (Addendum #7).

13. Severe weather conditions caused the District to request a postponement of the February 16, 1990 Hearing date. The Hearing Officer and the parents' attorney agreed, and the Hearing was rescheduled for Feb-

ruary 23, 1990 and was confirmed to all parties on February 15, 1990 (Addendum #8).

14. The Hearing was held on February 23, 1990 and re-convened on February 28, 1990, with the written stipulation of the parties (marked as Addendum #1 on February 28, 1990 by the Hearing Officer).

B. *PROVISIONS OF RECORDS*:

1. *PARENTS*:
Parents' attorney provided records under cover letters dated February 8, 9 and 14, 1990 (Addendum #9).

2. *DISTRICT*:
The attorney for the District provided records under cover letters dated February 8 and 12, 1990 (Addendum #10).

3. *ISSUES RELATIVE TO RECORDS*:
These records were provided within the five day rule, given the Hearing date of February 23, 1990. However, parents' attorney raised concerns that parents had received various reports in the mail that were not included in the official District documents, given that he had requested the District to produce all school records, including anecdotal records. The Hearing Officer carefully considered arguments on the issue of allowing parents to introduce these reports at the Hearing, but adhered to the five-day rule and did not permit their introduction. During the pendency of a hearing process, the child continues in a program, thereby generating point sheets, teacher notes to home, grades and other by-products of the education process. 23 *Illinois Administrative Codes* 226.640(d) specifically notes the five-day cut-off, presumably so that all parties

as well as the Hearing Officer can prepare for the Hearing by reviewing all written documentation. Moreover, the parties were free to present oral testimony, which, in this Hearing, was allowed in a free, nearly unrestricted manner.

III. DUE PROCESS HEARING

A. *PRELIMINARY*: Parents' attorney requested that the Hearing be closed to the public, that the child be present during the Hearing, and that witnesses be excluded. The Hearing Officer agreed that the Hearing be closed and that the child be present. A representative of each party/facility (parents, District 21 Administration, N.S.S.E.O. and Holmes) were not excluded.

B. *ATTENDEES/WITNESSES* (Combined List, 2-23 and 2-28-90):

Sheldon and Pauline Brozer, Parents — (Both testified)

Adam Brozer, Student — (Did not testify)

Michael Gerstein, Attorney for Adam and Mr. and Mrs. Brozer

Adair Gerstein, Paralegal for Parents' Attorney

Marcy Canel, Educational Therapist/Expert Witness — (Testified)

Carol Crane, Chairperson, Social Work Department, District 21 — (Did not testify)

Avrum B. Poster, Principal, Holmes Jr. High — (Testified)

Gerald Kiffel, Assistant Superintendent, District 21 — (Testified)

Gregory C. Best, L.D./B.D. Coordinator, N.S.S.E.O. — (Testified) (*NOTE*: not related to this Hearing Officer)

Michele Levitt, Student Support Center, (S.S.C.) Teacher at Holmes Jr. High — (Testified)
Heather Morris, Student Support Center, (S.S.C.) Teacher at Holmes Jr. High — (Testified)
Becky Gillespie, P.E. Teacher, Holmes Junior High — (Testified)
Marianne Woodward, P.E. Teacher, Frost Elementary School — (Testified)
Janet Murphy, L.D. Teacher, District 21 — (Testified)
Fay Hartog-Rapp, Attorney for the District
Witnesses were sworn by the Court Reporter.

C. *DISTRICT POSITION*: The child has a primary handicapping condition of Behavior Disordered/Seriously Emotionally Disturbed, with Learning Disabilities as a Secondary Handicapping Condition. The child requires a more restrictive placement than his current placement in the S.S.C. program at Holmes Junior High. The District requests that the Hearing Officer order the child placed at the District N.S.S.E.O. Jack London/Behavior Education Center, an alternate school for children with severe behavior problems, who may also have other handicapping conditions, including L.D.

D. *PARENTS' POSITION*: Parents do not want the child placed in the B.E.C./Jack London alternate school. They believe he is primarily an L.D. child who has been provided inappropriate and inadequate services and who has not had necessary evaluations, such as neurological and medical assessments. They believe that the child has Attention Deficit Disorder, that it is a handicapping condition interfering with his

educational process, that if his learning problems were properly addressed, he would not become frustrated and exhibit behavior problems. They feel that consequences for Adams's misbehavior have been designed to punish him for things he could not control. The parents propose Positive Peer Culture as a preferred intervention model. They believe that the child's fine motor, midline and other problems affecting his learning have been ignored by the District. They feel his Karate teacher has remediated some of the problems that the District refused to address.

E. *ANALYSIS OF THE WRITTEN RECORDS AND TESTIMONY*:

Educational Background: The child has been identified as handicapped (L.D.) since 1982 (Doc. D.433). Based on a re-evaluation and M.D.C. held in May 1986, the child was identified as Behavior Disordered/Learning Disabled and recommended for placement in the Student Support Center with mainstreaming for P.E. as the least restrictive placement to meet both his emotional and learning needs (Doc. D.461). In May of 1986, Parents refused that placement recommendation. The District capitulated to the parents' demand and the child remained in the L.D. resource program (Doc. D.459-463). Subsequently, parents signed permission for the child to participate in the Intermediate S.S.C. program at Kilmer School, on February 9, 1987, approximately nine months after the District first proposed the placement, a period of time marked by a significant number of unsuccessful

experiences for the child (Doc. D.372-427). In this S.S.C. program, the child participated in some mainstream classes. He also was to receive one hour a week of social work related services, a service that was subsequently terminated by parents. The child experienced problems in unstructured settings within the school. However, from his placement in the S.S.C. (B.D./L.D.) program in February 1987 through the end of the 1988-89 school year, the child passed all his courses with most grades in the C to B range, despite the documented behavior problems (Doc. P.72; Doc. D.124-153). During this 2½ years, the child was provided service by the same teacher who, at the parent request, also became one of his teachers in November 1989. For the 1989-90 school year, the child continued in an S.S.C. placement housed at Holmes Junior High. The child's behavior escalated (Doc. D.157-235) and all intervention strategies attempted in this setting have failed to meet the child's needs for structure and support. Parents have continued to decline District support services (social work). The District wants to provide a more restrictive educational program for the child but parents refuse to allow the change. Parents feel more restrictive, self-contained L.D. services can be provided to the child without moving him to the alternate B.D.-separate building.

F. *FINDINGS OF FACT/CONCLUSIONS OF LAW*: Pursuant to 23 *Illinois Administrative Code* 226 Subpart J, the Hearing Officer must determine if the child has needs which require

special education, if the evaluation procedures utilized have been appropriate in nature and degree, if the child's diagnostic profile is substantially verified, if the special education and related services are directly related to the child's needs, and if the child's rights have been fully observed.

1. *IF THE CHILD HAS NEEDS WHICH REQUIRE SPECIAL EDUCATION*:

   The child has needs which require special education. He is a Learning Disabled/Behavior Disordered-Seriously Emotionally Disturbed child and requires special education. Although Attention Deficit Disorder (or A.D.H.D.) is not a handicapping condition under the E.H.A., it is under Section 504 of the Rehabilitation Act of 1973 and, as recipients of Federal monies, the District must provide services to children who require services for A.D.D., although they may be precluded from using E.H.A.B. funds for those services if the child is not otherwise eligible under the E.H.A. 1989 E.H.L.R. 213: 193; 1989 E.H.L.R. SA-148; 1989 E.H.L.R. 401: 311; 1989 E.H.L.R. 353: 205; 1989 E.H.L.R. O.C.R./COMPLAINT LOFS, 353: 201; 1989 E.H.L.R. 213: 250; February 13, 1989 O.C.R. Director Sue Gamm's Letter of Information.

   However, this child is an E.H.A. eligible L.D./B.D. child. The presence of A.D.D. as referenced in the District's psychological report of 12/88 (Doc. D.265-270) and included by reference in the psychological report of 2/5/90 (Doc. D.545-546) would not result in any change in handicapped eligibility since he is already eligible under both the E.H.A. and 504.

2. *IF THE EVALUATION PROCEDURES UTILIZED HAVE BEEN APPROPRIATE IN NATURE AND DEGREE*:

The prior re-evaluation conducted by the District was in February 1989, with selected components of a case study completed by the District/N.S.S.E.O. in February 1990, just prior to this Hearing. Because the District, with representation by an attorney, and the parents, with representation by an attorney, mutually agreed to the components to be up-dated (Addenda #4, 5, 7 and Doc. D.527) and since no requests for additional evaluations were raised prior to the start of the Hearing, this Hearing Officer accepts the Pre-Hearing decision of the participants regarding the evaluations. Parent requests at the Hearing for new medical and neurological assessments are recognized. Either party may choose to obtain these examinations as an option at their own expense, but, given the rationale and documents cited above, they are not required for disposal of the issue of this Hearing. Moreover, Document D.527 clearly notes that the District did not feel a medical evaluation was necessary and parents agreed by signing this permission. Parents received the document for their signature *after* the District had prepared it, and either the parents or their attorney could have added a note to the document to reflect their desire to have the District conduct other evaluations such as medical or neurological.

The evaluation procedures utilized have been appropriate in nature and degree in this particular case, given the detailed supportive documentation of the professionals

who have worked closely with the child over an extended period of time. The documentation clearly tracks the impact of the child's handicapping condition on his educational and social behaviors.

3. *IF THE CHILD'S DIAGNOSTIC PROFILE IS SUBSTANTIALLY VERIFIED:*

The child is a B.D./L.D. student; the diagnostic profile is substantially verified. Any program in which the child is placed must address both his B.D. and his L.D. needs not just through the provision of staff certified in the handicapping condition but through a program model with individualized strategies for addressing the multiple needs of the child.

4. *IF THE SPECIAL EDUCATION PLACEMENT AND RELATED SERVICES ARE DIRECTLY RELATED TO THE CHILD'S NEEDS:*

The current placement in the S.S.C. at Holmes Junior High is not directly related to the child's needs and the District is correct in seeking a more restrictive placement that will allow the child to achieve success and halt his current pattern of failure in school. The issue of what constitutes an appropriate program specifically individualized for this child is a critical issue which requires a comprehensive examination of the underlying problems the child has either experienced directly in the academic setting or which have occurred outside school but have impacted negatively in the educational setting.

a. Parents have refused support services/ from District-employed staff, such as social workers. Parents stated that "if

I need one I'll get my own." She also said she wanted confidences kept, that information should not be shared among school staff. However, she could not give any instance when any confidences were violated. When asked if prior medical history had been shared with the District, she responded, "No, it is none of their business," although she had specific information regarding pediatric exams and discussion (but not prescription) of medication. The existence of this secreted information reflects negatively on parents' current request that the District conduct a medical exam.

b. Parents recognize that the child's version of facts is often different than that of the staff but stated that they believe the child more than a teacher.

c. Parents do not want after school detention or quiet lunches used as intervention strategies but when asked what strategies might be used, the parent suggested a lunch study hall and described the quiet lunch used by the school but which parents had vehemently opposed. Parents also felt that talking to him, 1 - 1 teaching and physically modifying the classroom would be successful, but these strategies have already been tried without success by the staff. Parents further described consequences they use at home for the child's inappropriate behavior. These strategies include:

— no T.V.
— staying in after school
— no Nintendo
— no Karate

d. Approximately two years ago, the child had been promised and given a gun as a reward. It has since been taken away.

e. The child is not permitted to stay after school because he is responsible for giving his grandfather his medication.

f. There appears to be no boundaries between the child and the parents. The result, as clearly demonstrated at the Hearing, is that the parents share their negative opinions about the school and staff with the child; he also realizes that parents believe his statements to be more credible than those of all the professionals. Further, he has been privy to derogatory statements made about the staff, ill-advised statements that cannot help but sabotage and undermine whatever educational program the District develops.

g. The parents have what appear to be irreconcilable differences with the District.

It is questionable if even minimal success for the child will result from any except the most restrictive placement which can provide the most comprehensive structured program with immediate consequences, at all times. Given the immediate need for this child to be allowed to be a child, to be treated as a child and not as an adult, a flexible positive peer culture program model would be a therapeutic model likely to provide a comprehensive approach to meeting both the behavioral and learning needs of the child. The L.D./B.D. coordinator pointed out legitimate con-

cerns regarding P.P.C., and his input would be important. The child needs to develop appropriate behavior patterns, personal responsibility and care and concern for himself and others. His manipulative behaviors must be channeled into positive experiences. For example, the success and personal worth he has felt through Karate must be expanded into more meaningful on-going positive experiences, since he cannot substitute Karate for appropriate problem-solving techniques throughout his life.

5. *IF THE CHILD'S RIGHTS HAVE BEEN FULLY OBSERVED*:

In this case, the Hearing Officer will not engage in a retroactive recognition and supervision evaluation of the District, its forms, policies and procedures. The District has exhibited good faith in *all* its dealings in this case. Any procedural errors, should any have occurred, are *de minimus*, given the history of refusals of service by the parents. For example, it is not reasonable that even minimal social work services be denied this child by his parents, as such action directly denies him his right to a free appropriate public education. The child's rights have been fully observed by the District.

ORDER:

1. Within 20 days of the last day to Appeal this Order, the District shall refer the child for placement in the Arden Shore Residential Education Facility in the positive peer culture model. His placement there shall include the opportunity for him to participate, upon meeting staff-designated behavioral

criteria, in his current Karate activities after school. Related services shall be fully delineated at an I.E.P. meeting to be scheduled by the District with appropriate notice and participants, including the facility staff. The I.E.P. must specify at least weekly participation by the parents.

2. Because of the current waiting list at Arden Shore, this placement may be delayed.

3. In the interim, an I.E.P. shall be developed at conference held no later than ten (10) days after the last day to appeal this order. As an interim program, pending implementation of Order 1 above, the child shall be placed immediately at the B.E.C./London School, with the following program components/services to be included in the child's interim I.E.P.:

   a. The child shall be placed on a Level system with his advancement in the system determined according to his functional behavior in academic and social situations. Daily feedback regarding his progress shall be provided to the child. Modified peer culture elements shall be provided as determined appropriate by the team.

   b. Specific behavior guidelines and resultant privileges shall be discussed with the child and parents and shall include the consequences for inappropriate behavior that were suggested by parents:

      — no T.V.
      — staying in after school
      — no Nintendo
      — no Karate

The B.E.C. staff shall develop with parents a coordinated communication system to let parents know which, if any, of these restictions need to be imposed at home based on the child's functioning at school.

c. The parents shall align as co-treatment leaders with school staff, and shall separate the child from adult decisionmaking. Program components may be explained to the child but his approval is not required for implementation of the program.

d. Parents shall implement a point system at home that coordinates with the B.E.C. system, with specific goals to improve the child's internal controls and decrease external control by staff/adults. Staff will assist parents in development of this plan and it shall be on the I.E.P.

e. A time-out system shall be utilized at school and at home to prevent escalation of behavior and to allow the child to gain self-control.

f. The child shall participate in the development of personal goals and strategies for attainment of these goals.

g. If parents approve, parents' private expert shall be afforded an opportunity to review the child's entire file, to observe the child in the classroom and to participate in M.D.C./I.E.P. meetings. Her input and proposed strategies shall be considered and integrated into the I.E.P. with appropriate consensus of the team.

h. In addition to specific management plan and detailed delineation of the child's

L.D. needs and strategies to address them, the following related services shall be a part of the interim I.E.P., as well as any other services deemed appropriate by the team:

- psychological/social work counseling services-group, individual and parent training/counseling/support group
- transportation
- nurse
- medical/psychiatric consultation
- teacher's assistant
- psychoeducational consultation

4. No later than five days from the last day to appeal this Order and before any I.E.P. meetings, the parents and child shall visit both Arden Shore and B.E.C./Jack London School. Carol Crane shall coordinate the visits and shall accompany the parents. Parents' attorney and their private educational therapist may also accompany parents if parents wish.

5. The Interim program shall be reviewed at regular intervals of every three weeks and may be modified by consensus of the team to adjust to the child's functioning during the interim and shall be updated to provide a comprehensive I.E.P. prior to placement at Arden Shore.

6. The participants were entitled to a prompt start of the second day of the Hearing (February 28, 1990). Because court reporter problems directly caused a delay of approximately 1½ hours, the parents shall be reimbursed for their costs incurred during

the 1½ hour wait (9:00 a.m. - 10:30 a.m. on 2/28/90).

7. The parents shall allow communication between the District staff and the pediatricians who parents stated have evaluated the child and determined that he does not need medication.

8. The District shall follow the provisions of *Honig v. Doe* should removal of the child from school be necessary during the timeline for Appeal and for conclusion of any appeal, should one be filed.

V. APPEAL INSTRUCTIONS:

If either party disagrees with this Decision, they may, within 15 days of receipt of the Decision, Appeal this Decision, appeal this Decision [sic] to the Illinois State Board of Education, Legal Department, 100 West Randolph Street, Suite 14-300, Chicago, Illinois 60601. The appeal may be filed by mail or personal service and *must include* the following:

1. A statement that an Appeal of Level I Decision is being requested;

2. A statement setting forth the portions of the Level I Decision with which the appealing party disagrees;

3. A statement setting forth the reasons why the Decision should be changed;

4. A statement of the relief requested;

5. A statement requesting oral argument, if desired;

NOTE: A new hearing is not required. A hearing will only be convened if specifically requested by a party and only for the

purpose of receiving additional evidence or oral argument.

6. A statement indicating that a copy of the request for appeal has been served on the other party;
7. The name, address, and phone number of both parties to the Level I hearing.

Within ten (10) days of filing an appeal, or within ten (10) days of receipt of the Notice of Appeal, the school district shall transmit to the State Board Legal Department in Chicago a complete administrative record of the Level I hearing, including a transcript, records and reports presented at the hearing, other exhibits and material presented, and a copy of the Level I decision. The district shall simultaneously send a complete administrative record to the parties.

/s/ MARGIE BEST, Level I H.O.
MARGIE BEST, Level I Impartial
Due Process Hearing Officer

March 8, 1990
DATE

cc: Mr. Bill Charis, Supervisor of Procedural Safeguards
Illinois State Board of Education.

Enclosures:
Addenda #1-10 (22 pages)

STATUTES INVOLVED

20 U.S.C. Section 1401(16) (1988)

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

20 U.S.C. Section 1401(17) (1988)

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. Section 1401(18) (1988)

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. Section 1401(19) (1988)

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1412 (1988)

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related

services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent possible, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

20 U.S.C. § 1415 (1988)

§ 1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provisions of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence

at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if—

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian

is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that—

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and

(c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Ill.Rev.Stat. 1989, ch. 122, par. 14-8.02 (eff. until 7/1/90)

14-8.02. Identification, evaluation and placement of children

Text of paragraph effective until July 1, 1990.

§ 14-8.02. Identification, Evaluation and Placement of Children. (a) The State Board of Education shall make rules under which local school boards shall determine the eligibility of children to receive special education. Such rules shall ensure that a free appropriate public education be available to all handicapped children as defined in Section 14-1.02. The State Board of Education shall require local school districts to administer non-discriminatory assessment tests to Hispanic students to determine their eligibility to receive special education. The placement of Hispanic students in special education programs and facilities shall be made in accordance with the test results. For the purposes of this Section, "Hispanic" means a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race. For purposes of determining the eligibility of children the State Board of Education shall include in the rules definitions of "case study", "staff conference", "individualized educational program", and "qualified specialist" appropriate to each category of handicapped children as defined in this Article.

(b) No child shall be eligible for special education facilities except with a carefully completed case study fully reviewed by professional personnel in a multidisciplinary staff conference and only upon the recommendation of qualified specialists. At the conclusion of the multidisciplinary staff conference, the parent or guardian of the child shall be given a copy of the multidisciplinary conference summary report and recommendations, which in-

cludes options considered, and be informed of their right to obtain an independent educational evaluation if they disagree with the evaluation findings conducted or obtained by the school district. If the school district's evaluation is shown to be inappropriate, the school district shall reimburse the parent for the cost of the independent evaluation. The State Board of Education shall, with advice from the State Advisory Council on Education of Handicapped Children on the inclusion of specific independent educational evaluators, prepare a list of suggested independent educational evaluators. The State Board of Education shall supply school districts with such list and make the list available to parents at their request. School districts shall make the list available to parents at the time they are informed of their right to obtain an independent educational evaluation. However, the school district may initiate an impartial due process hearing under this Section within 5 days of any written parent or guardian request for an independent educational evaluation to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has a right to an independent educational evaluation, but not at public expense. An independent educational evaluation at public expense must be completed within 30 days of a parent or guardian written request unless the school district initiates an impartial due process hearing or the parent or guardian or school district offers reasonable grounds to show that such 30 day time period should be extended. If the due process hearing decision indicates that the parent or guardian is entitled to an independent educational evaluation, it must be completed within 30 days of the decision unless the parent or guardian or the school district offers reasonable grounds to show that such 30 day period should be extended. If a parent disagrees with the summary report or recommendations of the multidisciplinary conference or the findings of any educational evaluation which results therefrom, the school district shall not proceed with a placement based upon such evaluation and the child shall remain in his or her regular

classroom setting. No child shall be eligible for admission to a special class for the educable mentally handicapped or for the trainable mentally handicapped except with a psychological evaluation and recommendation by a school psychologist. Consent shall be obtained from the parent or guardian of a child before any evaluation is conducted. If consent is not given by the parent or guardian or if the parent or guardian disagrees with the findings of the evaluation, then the school district may initiate an impartial due process hearing under this Section. The school district may evaluate the child if that is the decision resulting from the impartial due process hearing and the decision is not appealed or if the decision is affirmed on appeal. The determination of eligibility shall be made within 60 school days from the date of referral by school authorities for evaluation by the district or date of application for admittance by the parent or guardian of the child. In those instances when students are referred for evaluation with fewer than 69 pupil attendance days left in the school year, the eligibility determination shall be made prior to the first day of the following school year. After a child has been determined to be eligible for a special education class, such child must be placed in the appropriate program pursuant to the individualized educational program by or no later than the beginning of the next school semester. The district shall indicate to the parent or guardian and the State Board of Education the nature of the services the child will receive for the regular school term while waiting placement in the appropriate special education class.

(c) To the maximum extent appropriate, the placement shall provide the child with the opportunity to be educated with children who are not handicapped. Placement in special classes, separate schools or other removal of the handicapped child from the regular educational environment shall occur only when the nature of the severity of the handicap is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. If there is a disagreement between

parties involved regarding the special education placement of any child, either in-state or out-of-state, the placement is subject to impartial due process procedures described in Article 10 of the Rules and Regulations to Govern the Administration and Operation of Special Education.

(d) No child who comes from a home in which a language other than English is the principal language used may be assigned to any class or program under this Article until he has been given, in the principal language used in his home, tests reasonably related to his cultural environment. All testing and evaluation materials and procedures utilized for evaluation and placement shall not be racially or culturally discriminatory.

(e) Nothing in this Article shall be construed to require any child to undergo any physical examination or medical treatment whose parents or guardian object thereto on the grounds that such examination or treatment conflicts with his religious beliefs.

(f) School boards or their designee shall provide to the parents or guardian of a child prior written notice of any decision (a) proposing to initiate or change, or (b) refusing to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to their child, and the reasons therefor. Such written notification shall also inform the parent or guardian of the opportunity to present complaints with respect to any matter relating to the educational placement of the student, or the provision of a free appropriate public education and to have an impartial due process hearing on the complaint. The notice shall inform the parents or guardian in the parents' or guardian's native language, unless it is clearly not feasible to do so, of their rights and all procedures available pursuant to this Act and federal law 94-142;[1] it shall be the responsibility of the State Superintendent to develop uniform notices setting forth the procedures available under this Act and federal law 94-142 to be used by all school boards. The notice shall also inform the parents or guardian of

the availability upon request of a list of free or low-cost legal and other relevant services available locally to assist parents or guardians in initiating an impartial due process hearing. Any parent or guardian who is deaf, or does not normally communicate using spoken English, who participates in a meeting with a representative of a local educational agency for the purposes of developing an individualized educational program shall be entitled to the services of an interpreter.

(g) A Level I due process hearing, hereinafter referred as the hearing, shall be conducted upon the request of the parents or guardian or local school board by an impartial hearing officer appointed as follows: If the request is made through the local school district, within 5 school days of receipt of the request, the local school district shall forward the request to the State Superintendent. Within 5 days after receiving this request of hearing, the State Board of Education shall provide a list of 5 prospective impartial hearing officers. The State Board of Education, by rule or regulation, shall establish criteria for determining which persons can be included on such a list of prospective hearing officers. No one on the list may be a resident of the school district. No more than 2 of the 5 prospective hearing officers shall be gainfully employed by or administratively connected with any school district, or any joint agreement or cooperative program in which school districts participate. In addition, no more than 2 of the 5 prospective hearing officers shall be gainfully employed by or administratively connected with private providers of special education services. The State Board of Education shall actively recruit applicants for hearing officer positions. The board and the parents or guardian or their legal representatives within 5 days shall alternately strike one name from the list until only one name remains. The parents or guardian shall have the right to proceed first with the striking. The per diem allowance for the hearing officer shall be established and paid by the State Board of Education. The hearing shall be closed to the public except that the parents or guard-

ian may require that the hearing be public. The hearing officer shall not be an employee of the school district, an employee in any joint agreement or cooperative program in which the district participates, or any other agency or organization that is directly involved in the diagnosis, education or care of the student or the State Board of Education. All impartial hearing officers shall be adequately trained in federal and state law, rules and regulations and case law requiring special education. The State Board of Education shall use resources from within and outside the agency for the purposes of conducting this training. The impartial hearing officer shall have the authority to require additional information or evidence where he or she deems it necessary to make a complete record and may order an independent evaluation of the child, the cost of said evaluation to be paid by the local school district. Such hearing shall not be considered adversary in nature, but shall be directed toward bringing out all facts necessary for the impartial hearing officer to render an informed decision. The State Board of Education shall, with the advice and approval of the Advisory Council on Education of Handicapped Children, promulgate rules and regulations to establish the qualifications of the hearing officers and the rules and procedure for such hearings. The school district shall present evidence that the special education needs of the child have been appropriately identified and that the special education program and related services proposed to meet the needs of the child are adequate, appropriate and available. Any party to the hearing shall have the right to: (a) be represented by counsel and be accompanied and advised by individuals with special knowledge or training with respect to the problems of handicapped children at the party's own expense; (b) present evidence and confront and cross-examine witnesses; (c) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing; (d) obtain a written or electronic verbatim record of the hearing; (e) obtain written findings of fact and a written decision. The student shall be allowed to attend the hearing unless the hearing officer

finds that attendance is not in the child's best interest or detrimental to the child. The hearing officer shall specify in the findings the reasons for denying attendance by the student. The hearing officer, or the State Superintendent in connection with State level hearings, may subpoena and compel the attendance of witnesses and the production of evidence reasonably necessary to the resolution of the hearing. The subpoena may be issued upon request of any party. The State Board of Education and the school board shall share equally the costs of providing a written or electronic record of the proceedings. Such record shall be transcribed and transmitted to the State Superintendent no later than 10 days after receipt of notice of appeal. The hearing officer shall render a decision and shall submit a copy of the findings of fact and decision to the parent or guardian and to the local school board within 10 school days after the conclusion of the hearing. The hearing officer may continue the hearing in order to obtain additional information, and, at the conclusion of the hearing, shall issue a decision based on the record which specifies the special education and related services which shall be provided to the child in accordance with the child's needs. The hearing officer's decision shall be binding upon the local school board and the parents unless such decision is appealed pursuant to the provisions of this Section.

(h) Any party aggrieved by the decision may appeal the hearing officer's decision to the State Board of Education and shall serve copies of the notice of such appeal on the State Superintendent and on all other parties. The review referred to in this Section shall be known as the Level II review. The State Board of Education shall provide a list of 5 prospective, impartial reviewing officers. No reviewing officer shall be an employee of the State Board of Education or gainfully employed by or administratively connected with the school district, joint agreement or cooperative program which is a party to this review. Each person on the list shall be accredited by a national arbitration organization. The per diem allowance

for the review officers shall be paid by the State Board of Education and may not exceed $250. All reviewing officers on the list provided by the State Board of Education shall be trained in federal and state law, rules and regulations and case law regarding special education. The State Board of Education shall use resources from within and outside the agency for the purpose of conducting this training. No one on the list may be a resident of the school district. The board and the parents or guardian or other legal representatives within 5 days shall alternately strike one name from the list until only one name remains. The parents or guardian shall have the right to proceed first with the striking. The reviewing officer so selected shall conduct an impartial review of the Level I hearing and may issue subpoenas requiring the attendance of witnesses at such review. The parties to the appeal shall be afforded the opportunity to present oral argument and additional evidence at the review. Upon completion of the review the reviewing officer shall render a decision and shall provide a copy of the decision to all parties.

(i) No later than 30 days after receipt of notice of appeal, a final decision shall be reached and a copy mailed to each of the parties. A reviewing officer may grant specific extensions of time beyond the 30-day deadline at the request of either party. If a Level II hearing is convened the final decision of a Level II hearing officer shall occur no more than 30 days following receipt of a notice of appeal, unless an extension of time is granted by the hearing officer at the request of either party. The State Board of Education shall establish rules and regulations delineating the standards to be used in determining whether the reviewing officer shall grant such extensions. Each hearing and each review involving oral argument must be conducted at a time and place which are reasonably convenient to the parents and the child involved.

(j) Any party aggrieved by the decision of the reviewing officer, including the parent or guardian, shall have the right to bring a civil action with respect to the complaint presented pursuant to this Section, which action

may be brought in any circuit court of competent jurisdiction within 120 days after a copy of the decision is mailed to the party as provided in subsection (i). The civil action provided above shall not be exclusive of any rights or causes of action otherwise available. The commencement of a civil action under subsection (j) of this Section shall operate as a supersedeas. In any action brought under this Section the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate. In any instance where a school district willfully disregards applicable regulations or statutes regarding a child covered by this Article, and which disregard had been detrimental to the child, the school district shall be liable for any reasonable attorney's fees incurred by the parent or guardian in connection with proceedings under this Section.

(k) During the pendency of any proceedings conducted pursuant to this Section, unless the State Superintendent of Education, or the school district and the parents or guardian otherwise agree, the student shall remain in the then current educational placement of such student, or if applying for initial admission to the school district, shall, with the consent of the parents or guardian, be placed in the school district program until all such proceedings have been completed. The costs for any special education and related services or placement incurred following 60 school days after the initial request for evaluation shall be borne by the school district if such services or placement are in accordance with the final determination as to the special education and related services or placement which must be provided to the child, provided however that in said 60 day period there have been no delays caused by the child's parent or guardian.

(*l*) Whenever the parents or guardian of a child of the type described in Section 14-1.02 are not known, or unavailable, a person shall be assigned to serve as surrogate parent for the child in matters relating to the identification, evaluation, and educational placement of the child

and the provision of a free appropriate public education to the child. Persons shall be assigned as surrogate parents by the State Superintendent of Education. The State Board of Education shall promulgate rules and regulations establishing qualifications of such persons and their responsibilities and the procedures to be followed in making such assignments. Such surrogate parents shall not be employees of the school district, an agency created by joint agreement under Section 10-22.31, an agency involved in the education or care of the student, or the State Board of Education. Services of any person assigned as surrogate parent shall terminate if the parent or guardian becomes available unless otherwise requested by the parents or guardian. The assignment of a person as surrogate parent at no time supersedes, terminates, or suspends the parents' or guardian's legal authority relative to the child. Any person participating in good faith as surrogate parent on behalf of the child before school officials or a hearing officer shall have immunity from civil or criminal liability that otherwise might result by reason of such participation, except in cases of willful and wanton misconduct.

(m) At all stages of the hearing the hearing officer shall require that interpreters be made available by the local school district for persons who are deaf or for persons whose normally spoken language is other than English.

(n) Whenever a person refuses to comply with any subpoena issued under this Section, the circuit court of the county in which such hearing is pending, on application of the State Superintendent of Education or the party who requested issuance of the subpoena may compel obedience by attachment proceedings as for contempt, as in a case of disobedience of the requirements of a subpoena from such court for refusal to testify therein.

Amended by P.A. 85-1209, Art. II, § 2-96, eff. Aug. 30, 1988; P.A. 85-1316, § 1, eff. Aug. 31, 1988; P.A. 85-1440, Art. II, § 2-54, eff. Feb. 1, 1989.

[1] 20 U.S.C.A. §§ 1401, 1405, 1406, 1411 et seq.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Nos. 91-849 and 91-865

October Term 1991

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21, and ILLINOIS STATE BOARD OF EDUCATION,

Petitioners,

vs.

DOUGLAS C. CANNON and SHELDON and PAULINE BROZER, on behalf of ADAM BROZER,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals, Seventh Circuit

BRIEF OF RESPONDENTS SHELDON AND PAULINE BROZER IN OPPOSITION TO THE PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exercise of the Supreme Court's discretionary certiorari jurisdiction is warranted where the District Court and the Court of Appeals applied the standard set by this court in *Hendrick Hudson District Board of Education v. Rowely*, 458 U.S. 176 (1982) to affirm the modifications ordered by state educational administrative authorities, after two levels of evidentiary hearings, to an individualized educational program as initially proposed for a handicapped child by a local school district pursuant to the Education of the Handicapped Act, 20 U.S.C. §1400 et seq.

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STATEMENT OF THE CASE

The Education of the Handicapped Act

This case arises under the Education of the Handicapped Act, 20 U. S. C. §§1400 et seq. ("EHA").[1] The EHA provides federal funds to assist states in educating handicapped children. To receive these funds, a state must provide each handicapped child with a "free appropriate public education" tailored to the child's individual needs by an "individualized educational program" (IEP).

The development of an IEP requires the participation of a team including the parents, the child's teacher, designated specialists, and a representative of the local education agency, 20 U.S.C. §1401(19). Once promulgated, an IEP must

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[1] Now renamed the Individuals with Disabilities Education Act, ("IDEA"), Pub.L No. 101-476, 104 Stat. 1141.

be reviewed annually and revised when necessary, 20 U.S.C. §§1414(a)(5), 1413(a)1), (11). If complaints arise, the state must convene an "impartial due process hearing," 20 U.S.C. §1415(b)(2).

Illinois has established procedures to comply with the EHA, Ill. Rev. Stat., Ch. 122, §14-8.02 (1989). Under Illinois law there are two levels of administrative review. The parents, guardian, or local school board dissatisfied with an IEP as originally promulgated may reqeust a Level I due process hearing through the State Board of Education by notice submitted to the State Superintendent of Education, *Ill. Rev. Stat.*, Ch. 122, §14-8.02(g). Any party aggrieved by the decision of the Level I hearing officer may appeal to the State Board of Eduation, which provides Level II review through impartial review

officers, *Ill. Rev. Stat.*, Ch. 122, §14-8.02(h).

The EHA provides that any party aggrieved by the outcome of administrative review may bring a civil action in state or federal court, 20 U.S.C. §1415(e)(2). In any such action, "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate," 20 U.S.C. §1415(e)(2). The court's focus is upon the educational program which finally emerges from the administrative review process, not the IEP as originally proposed, *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir., 1990), *Springdale School Dist. v. Grace*, 693 F.2d

41 (8th Cir., 1982), *cert. den.*, 461 U.S. 927 (1983).

Background and History of this Litigation

Adam Brozer is a fifteen-year old junior high school student who is handicapped primarily by a behavior disorder and also by a learning disability. His behavior disorder was identified in May, 1986, and his public school board, Petitioner District 21, recommended that he be placed in the Student Support Center of the Kilmer School, a public school. After initial reluctance, Adam's parents, Respondents Sheldon and Pauline Brozer, agreed to the SSC Kilmer placement.

Adam remained at SSC Kilmer from February of 1987 through the 1988-89 school year, but by the end of that time his behavior had become disruptive and

violent. The district, fearing that he would not be able to function the following year at Holmes Junior High School, recommended after a staff conference that he be placed at the Behavior Education Center at Jack London School. BEC London is a public school for children with serious behavior disorders.

In May of 1989 another staff conference was held to formulate the "individualized educational program" required by the EHA. The district recommended BEC London. The Brozers objected to the proposed placement, preferring placement at the Student Support Center at Holmes Junior High School. The district accepted the Brozers' preference, and Adam started junior high school in the fall of 1989 at SSC Holmes.

The SSC Holmes placement was not

successful. Adam quickly showed both behavioral and academic deterioration. The Brozers withdrew their consent for Adam to be disciplined in school or to receive social services. A third staff conference was held on November 11, 1989, the staff concluding that SSC Holmes was not serving Adam's educational needs. The district once again recommended placing Adam at BEC London. The parents once again refused to consent.

In response to the Brozers' refusal to consent to placement at BEC London, the district initiated the due process review procedure under 20 U.S.C. §1415(b)(1)(E).

At the Level I hearing, held in February, 1990, the parents argued that the BEC London placement was inappropriate because Adam's principal handicap was a learning disability, rather than a

behavior disorder. On this issue the Level I hearing officer agreed with the district, finding that Adam was primarily behavior disordered and only secondarily learning disabled.

The hearing officer did not, however, endorse the BEC London placement as sought by the district. Instead, she found that "irreconcilable differences" had developed between the Brozers and the district.[2]

Accordingly, the Level I hearing officer ordered that Adam be enrolled

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[2] The Level 1 hearing officer listed actions taken by the Brozers which impeded the district's efforts to aid Adam's education, including: (1) the parents' refusal of support services for Adam, (2) the parents' refusal to supply Adam's medical history to his school, (3) the parents' refusal to allow detention or quiet lunches to be used as intervention strategies for Adam, (4) the fact that the parents had made derogatory comments about school staff members in Adam's presence, with the effect of undermining the school's educational programs. (ISBE App. 64-67

neither at BEC London, as the district had proposed, nor at SSC Holmes, as requested by the parents, but at Arden Shore Residential Educational Facility in Lake Bluff, Illinois. Arden Shore is a private residential school. Under the Level I order, Adam was to attend Arden Shore at public expense, and until Arden Shore had a vacancy for him he was to attend BEC London. The parents appealed the Level I decision and order, requesting at the Level II review hearing that Adam be placed either at SSC Holmes or at a private day placement closer to home than Ardem Shore. The School district did not appeal the Level I decision.

The Level II review officer[3] granted

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[3] The Level II review officer, Douglas C. Cannon, is named as a respondent in the petition for writ of certiorari filed by petitioner ISBE No. 91-865.

the relief as requested by the parents.[4] He concurred in the district's judgment that Adam needed a placement more restrictive than that available at SSC Holmes. He rejected, however, both the district's proposed placement of BEC London and the Level I residential placement at Arden Shore. He held that the Level I hearing officer had failed to order the least restrictive placement that would still meet Adam's needs, 20 U.S.C. §1412(5), and found that placement in a residential school was not necessary. He ordered the district to place Adam at a private day school within thirty minutes commuting distance from his home or within ten miles from the edge of his home school

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[4] However, the Level II review officer designated the School District the prevailing party for purposes of any petition for attorney fees. (ISBE App. 49)

district (ISBE App. 48).[5]

At the heart of the present litigation are the statements of the Level I and Level II hearing officers regarding their reasons for ordering private school placement for Adam. Both officers noted that "an extremely adversarial and distrustful relationship exists by the parents *and student* toward the School District." (ISBE App. 43, emphasis supplied) The Level II officer referred to incidents which he observed during the hearing as demonstrating "the subjective state of mind of the parents as to the adversarial or 'siege' mentality that now exists." (ISBE App. 44)

The Level II hearing officer was at pains to note that the parents' attitude

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[5] The text of the Level II order is found at ISBE App. 48-49.

was in no way brought about "by any improper conduct of the School District," and that both hearing officers had found that "the District has displayed good faith in all its dealings in this matter." (ISBE App. 44) This hearing officer, while very critical of the parents' judgment in their dealings with the district, at the same time recognized that they, too, acted in subjective good faith and noted their powerful emotional commitment to the well-being of their son.[6]

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[6] "This Hearing Officer can in no way condone the parents' conduct in this matter, which can be described at best as being obstructionist and undermining the efforts of the School District to assist their son. However, this Hearing Officer must note, as a parent, that where ones [sic] is concerned, it is very, very, difficult to respond intellectually rather than emotionally. Instinctively, when a child is threatened, as no doubt these parents see their child being 'threatened' by the School District, a parent rushes to the defense. Unfortunately, that point where emotion ebbs, and intellect once again

Both hearing officers specifically found that the "irreconcilable differences" (ISBE App. 66) and "adversarial and distrustful relationship" (ISBE App. 43) between the district and the parents was "a fact likely to effect the success or failure of the District's proposed placement at Jack London School." (ISBE App. 44)[7] Without reaching the academic question of whether the IEP as originally propounded by the district

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reigns, seems unlikely to be reached in the foreseeable future in this matter." (ISBE App. 46-47)

[7] "[T]his Hearing Officer must note the state of mind of the parents is a fact likely to effect the success or failure of the District's proposed placement at Jack London School. While not stated in so many words, the Level I Hearing Officer's decision is also clearly based upon this attitude that has arisen with the parents and the student." (ISBE App. 44)

might have been otherwise appropriate,[8] both hearing officers rejected the district's IEP placement proposal in favor of some form of private school placement. The primary reason for such placement was to avoid the ongoing confrontations and disagreements between the parents and the district which had "doomed the [SSC

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[8] Petitioner Illinois State Board of Education inaccurately and misleadingly frames the question presented for review, in part, as "whether the [ruling below] ... imposes an ... obligation on the States to defer to parental hostility to the Individualized Educational Program (IEP) developed for the child to receive educational benefits?" (Petition of ISBE, p. i., emphasis supplied) The ISBE's petition further attributes to the Court of Appeals a holding that this case involves parental hostility to "an otherwise appropriate IEP." (Petition of the ISBE, p. 12).

No court or administrative hearing officer has ever ruled, concluded, or suggested that the IEP proposed by the district was "otherwise appropriate" or "otherwise reasonably calculated to enable the child to receive educational benefits." In light of the findings of fact and dispositions ordered at hearings, the question was purely theoretical and was never addressed in any of the decisions below.

Holmes] placement to failure" and which gave the Level II hearing officer no reason to expect that the [BEC London] placement will be successful without parental cooperation." (ISBE App. 47)

The Federal Litigation

The parents accepted the decision of the Level II hearing officer. The district, although designated by the hearing officer as "the prevailing party" (ISBE App. 49), did not. Instead, the district filed suit pursuant to 20 U.S.C. §1415(e)(2) in the United States District Court for the Northern District of Illinois seeking reversal of that portion of the Level II administrative order which directed it to place Adam in a private day school at public expense.

Neither party sought to introduce additional evidence at the District Court

level, as either had a right to do under 20 U.S.C. §1415(e)(2), and the District Court made its ruling, without objection, on the basis of the administrative records and the briefs submitted by counsel.

After dealing with preliminary procedural questions, the District Court stated:

> The real issue remaining to be determined is whether the Level II officer could rely on the well-established facts concerning the parents' and Adam's negative attitudes towards the District's good-faith attempts at providing a free appropriate education to Adam in ordering a private, as opposed to public, day-school placement to be a part of the free appropriate education to which Adam is entitled under the EHCA. (ISBE App. 3)

It found that:

> [B]oth the Level I and the Level II hearing officers believed that Adam would not be able to satisfactorily obtain the required educational benefits from the District's proposed placement in light of the history of Adam's and his parents' relationship with the District.

(ISBE App. 36)

It was the District Court's conclusion that:

> giving due weight to the prior administrative proceedings in this case, the court finds a preponderance of the evidence supports the Level II hearing officer's conclusion that placement in a private day-school facility is necessary at this time in order for Adam to obtain the educational benefit mandated by the EHCA. Thus, the court agrees with the Level II order and finds it appropriate in all respects...

The District Court found in favor of the parents, affirming the Level II administrative order and directing that it be implemented. (ISBE App. 39)

The school district appealed to the Court of Appeals for the Seventh Circuit, which, with one judge dissenting, affirmed the ruling of the District Court concluding "the District Court rightly held that the BEC/Jack London placement did not meet the substantive standard set

by the EHA and that the IEP ordered by the Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam." (ISBE App. 11-12)[9]

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[9] In the words of the Court of Appeals,

"The district court applied the correct legal standard in affirming the decision of the Level II hearing officer ordering Adam to be placed in a private day school rather than at BEC/Jack London. A school district has met the substantive requirements of the EHA if its proposed placement is reasonably calculated to be of educational benefit to the handicapped child. The district judge properly kept this question foremost in his mind, as had the hearing officers before him. He ultimately concurred in the opinions of the Level I and Level II hearing officers that Adam '*would not be able to satisfactorily obtain the required education benefits from the district's proposed placement* in light of the history of Adam's and his parents' relationship with the District.'" (ISBE App. 7, emphasis in the original)

ARGUMENT

THIS CASE IS NOT APPROPRIATE FOR EXERCISE OF THE SUPREME COURT'S DISCRETIONARY CERTIORARI JURISDICTION. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS FOLLOWED SETTLED LAW AND CORRECTLY APPLIED THE CONTROLLING DECISION OF THIS COURT TO AFFIRM THE RULINGS OF STATE ADMINISTRATIVE HEARING OFFICERS IN A CASE GOVERNED BY ITS OWN FACTS AND WITHOUT PRECEDENTIAL VALUE.

Summary

This case calls no novel or significant legal issue to the attention of the Supreme Court. It presented the state educational administrators with an unusual, highly individual, problem. The state administrators, through two levels of hearings and review, devised a reasonable and appropriate solution. (ISBE App. 40-51, 52-72) The District Court reviewed the administrative records and concluded that it should defer to the expert administrative judgment. (ISBE App. 19-39) The Court of Appeals affirmed

the District Court. (ISBE App. 1-15)

Petitioners misleadingly describe this case, which called for the exercise of sound administrative judgment and practical sense, as a fundamentally legal controversy. They have argued in their petitions for certiorari that there is a conflict between the Court of Appeals for the Seventh Circuit and other Courts of Appeals, and even that there is a conflict within the Seventh Circuit itself.[10] Neither conflict exists. Petitioners further urge that the Seventh Circuit's ruling is in conflict with this Court's controlling decision in *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176 (1982). Again, no such conflict

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[10] No conflict within the Seventh Circuit was apparent to the Court of Appeals, which unanimously denied petitioner District 21's petition for rehearing and its suggestion for rehearing en banc. (ISBE App. 17)

exists. The Court of Appeals, like the District Court, relied upon and followed the *Rowley* decision.

The petitions for writ of certiorari should be denied because the courts and administrative authorities below did no more than apply settled principles of law to a specific factual situation calling for the exercise of professional educational knowledge, experience and judgment, and because they did so correctly.

The Petitions Mischaracterize the Ruling Below

The District Court observed on two separate occasions that Petitioner District 21 had mischaracterized the record.[11] The petitions for writ of

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[11] "As to the District's arguments concerning the lack of evidence of irreconcilable differences between the parents and the District and the Level II Officer's reliance on parental

certiorari similarly mischaracterize both the question presented to, and the decision made by, the Court of Appeals.

Petitioner District 21 inaccurately attributes to the Court of Appeals a determination "that the parents' egregious, disruptive and hostile course of conduct precluded the School District from implementing an IEP which was otherwise reasonably calculated to confer

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preference, the court finds the District has mischaracterized the record." (ISBE App. 31)

"The District ... argues that the Level II Officer's findings and conclusions ... were improperly based upon the letter of Dr. Atlas ... Although the Level II officer discussed Dr. Atlas' opinions ... [he] specifically stated that he had reached similar conclusions before he reviewed Dr. Atlas' letter. The District's attorney conveniently fails to mention this and characterizes the record in her brief to this court in a way which implies that the Level II officer relied only on Dr. Atlas' letter for his findings concerning [a specific issue] ... and that this letter formed the basis of the Level II order for private placement. This simply was not the case." (ISBE App.32)

educational benefits." (District's Petition, 6-7, *cf.* ISBE's Petition, 12) As noted above (footnote 8, supra.,) neither the Court of Appeals nor any other court or administrative officer ever found that IEP as originally proposed by the District was reasonable, "otherwise" or not. The findings below, at every stage of administrative and judicial review, were that the placement proposed by the District could not succeed. The distrust felt by the parents and by the student towards the District was a reef upon which any public school placement was considered sure to founder. In light of this virtual certainty it was neither necessary nor appropriate to consider whether the district's original IEP proposal might be

"otherwise" reasonable or appropriate.[12]

Petitioner ISBE likewise inaccurately represents the decision of the Court of Appeals. At page 13 of its petition for writ of certiorari, ISBE recites:

> "In applying [the *Rowley*] test, the proper focus is on the program proposed by the school district and not the program sought by the parents. [citations omitted]
>
> "The Seventh Circuit's opinion does not apply the *Rowley* test to the school district's proposed IEP. The Seventh Circuit, rather, defined the issue as whether the Level II Hearing Officer's order of a private day placement was reasonably calculated to be of educational benefit to Adam."

But the ISBE neglects to include the complete statement of the issue as defined

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[12] The statement in the District's petition to the effect that "[T]he majority [of the Court of Appeals] determined that the *parents' egregious, disruptive and hostile course of conduct* precluded the School District from implementing an IEP," (Dist. Pet., 6-7, emphasis added) is further misleading in implying that the emphasized words are those of the Court of Appeals. They are those of the petitioner.

by the Court of Appeals:

> "The question is simply whether the BEC/Jack London placement recommended by Adam's school district was inappropriate for Adam and whether the private day placement ordered by the Level II hearing officer is indeed reasonably calculated to be of educational benefit to Adam." (ISBE App. 6)

Petitioners Misunderstand Judicial Review of an IEP

More serious than Petitioners' misphrasings of the questions presented to and decided by the Court of Appeals is their fundamental misconception of what was actually before those courts for review. Petitioners, failing to distinguish between administrative and judicial review, have not recognized that the District Court and the Court of Appeals have upheld, not rejected, the IEP.

Petitioners contend that this case is so significant as to warrant the exercise

of the Supreme Court's certiorari review because the Court of Appeals for the Seventh Circuit changed the focus of judicial review of administrative IEP decisions under the EHA, in violation of the standard propounded by this Court in *Rowley*, in contravention of the holdings of other Courts of Appeals,[13] and even in contravention of its own previous decision in *Lachman v. Board of Education*, 852 F.2d 290 7th Cir., 1988).

Petitioners are mistaken. The District Court and the Court of Appeals reached a result advserse to the local school district, not because they misapplied or alterred the standard of review, but

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[13] *Cf. eg., Roland M. v. Concord School Committee*, 920 F.2d 983 (1st Cir., 1990), *G.D. v. Westmoreland School District*, 930 F.2d 942 (1st Cir., 1991), *Doe v. Defendant 1*, 898 F.2d 1186 (6th Cir., 1990), *Cain v. Yukon Public Schools, Dist. 1-27*, 775 F.2d 15 (10th Cir., 1985)

because the local district's proposal itself had been modified on review by the state's educational administrators. Petitioners assert that the courts below failed to focus on the appropriateness of the IEP. But focus on the IEP is precisely what the courts did. When a court reviews an IEP, "the court's focus is upon the educational program which finally emerges from the review process, not the IEP as originally proposed," *Roland M. v. Concord School Committee*, 910 F.2d 983, 988 (1st Cir., 1990), and see *Springdale School District v. Grace*, 693 F.2d 41 (8th Cir., 1982).

Although both petitioners cite and rely upon *Roland M.*, both are oblivious to its holding, and both argue as though a court reviewing an IEP is obligated to ignore the results of the state administrative

review process and reinstate the IEP originally proposed by the local school district unless it is plainly inappropriate. If Petitioners are correct, then the extensive provisions of the EHA for participation by parents and guardians, for due process hearing and review by the professional educational authorities of the state, and for judicial review and appeal, are rendered meaningless and the local district enjoys virtually dictatorial power to enforce its IEP as originally conceived.

It is plainly unrealistic to believe that this was the intent of Congress, and it would be an unwise allocation of the Supreme Court's time to grant certiorari for the sole purpose of rejecting a misconceived argument which no court has ever endorsed.

An examination of the authorities cited by Petitioners reveals that in every one of them, including the Seventh Circuit's own *Lachman* decision, the Court of Appeals was asked to review a case in which the state educational authorities had reviewed and affirmed the IEP as proposed by the local district. In the present case, on the contrary, the hearing and review officers rejected or significantly modified the IEP. It is for this reason alone, not because of any change in legal focus or misunderstanding of the *Rowley* rule, that when the District Court and the Court of Appeals upheld the Level II review officer's order they affirmed an IEP different from that which District 21 had originally submitted. Contrary to petitioners' contention, the decision of the Seventh Circuit in this case accords

perfectly with *Roland M. v. Concord, G.D. v. Westmoreland, Doe v. Defendant I, Cain v. Yukon,* and with *Lachman v. Board.*

The Petitioners fail to understand this, and devote their arguments to asserting the obviously inaccurate proposition that the Court of Appeals has given stubborn parents a veto power over educational authorities. A review of the opinion of the Court of Appeals immediately demonstrates that the alarmed Petitioners have read into that decision a meaning that is simply not there. In fact, the Seventh Circuit was careful to limit its ruling to the facts of the case before it. The opinion below unequivocally reaffirms the statement in *Lachman* that parents:

> do not have a right under the [EHA] to compel a school district to provide a specific program or employ a specific methodology in providing

> for the education of their handicapped child. (ISBE App. 8)

Lachman, 852 F.2d at 297, citing *Rowley,* 458 U.S. at 207. Furthermore, the Court of Appeals hedged its opinion against overly broad interpretation, clearly recognizing that the state hearing officers had been faced with a situation in which the IEP as initially proposed by the district could not succeed because of parental hostility which may not have been objectively warranted.

> *Lachman* aside, the district's larger point is well taken. Allowing a consideration of parental hostility to a state-proposed IEP to the extent that it limits the IEP's benefit to the child will result at times in rejection of the school district's proposal simply because the parents, perhaps irrationally, oppose it. The plaintiff school district here exhorts us not to adopt a position that will "reward" parents for aberrant or distasteful behavior. Under the EHA, however, our concern is not rewarding or punishing parents. The appropriate concern is finding a program which

> will be of educational benefit to the child. Were we to adopt the school district's position and hold that parental attitudes can never be considered even if they have impaired the workability of the IEP for the child, this would in effect be punishing children for the actions of their parents. A child whose parents oppose an IEP so vehemently as to "doom" its prospects should not be enrolled in the placement merely to enable educational agencies and federal courts to "discipline" parents. The EHA makes clear whose interest must be paramount. (ISBE App. 9-10)

The Court of Appeals was correct in ruling that "[t]he District Court rightly held that the BEC/Jack London placement did not meet the substantive standard set by the EHA and that IEP ordered by the Level II hearing officer is the least restrictive placement that will be of educational benefit to Adam." (ISBE App.11-12)

This case is not appropriate for review by the United States Supreme Court. The

petitions for writ of certiorari should be denied.

CONCLUSION

This case was correctly resolved through the state administrative hearing process. The District Court correctly upheld the Level II hearing officer. The Court of Appeals followed the EHA and the controlling decision of the Supreme Court in affirming the District Court. There is no conflict between the decision below and the Seventh Circuit's previous decision in *Lachman v. Board of Education,* and the decision below is fully in accord with the decisions of other Courts of Appeals.

The petitions for writs of certiorari should be denied. This case should be remanded to the Court of Appeals for the sole purpose of entertaining respondents' petition for attorney fees pursuant to 20

U.S.C. §1415(e)(4)(B).

Respectfully submitted,

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No. 91-849
No. 91-865

In the
Supreme Court of the United States
October Term, 1991

Board of Education of
Community Consolidated School District No. 21,
Petitioner,

v.

Illinois State Board of Education and
Sheldon and Pauline Brozer, on behalf of Adam Brozer,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

MOTION OF THE ILLINOIS ASSOCIATION OF SCHOOL BOARDS TO FILE BRIEF AS AMICUS CURIAE

The Illinois Association of School Boards (hereafter "IASB") respectfully moves this Court for leave to file the attached *Amicus* brief in support of Petitioner, Board of Education of Community Consolidated School District No. 21. Counsels for Petitioner and Respondent Illinois State Board of Education (Petitioner in No. 91-865) have granted their consent to this Motion, as indicated in the attached letters. Counsel for the Respondent Sheldon and Pauline Brozer on behalf of Adam Brozer has not consented.

The IASB is a voluntary non-profit association. It is organized pursuant to *The Illinois School Code* which declares that the activities of associations so organized constitute a public purpose. *Ill. Rev. Stat.* ch. 122, par. 23-1, *et seq.* IASB serves to aid and assist boards of education in performing their lawful functions and to promote, support, and advance the interests of public education in Illinois.

The IASB has 870 member school districts. Its governing body is a Board of Directors composed of members of local school boards whose combined experience gives the IASB a unique depth of understanding of the practical and legal considerations relevant to the operation of local school districts.

Each school district member of IASB will be affected by the Seventh Circuit's decision in this case. This decision jeopardizes their ability to effectively devise and implement appropriate educational placements under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* By virtue of its membership, organization, and leadership, the IASB is in a position to describe the impact of the Seventh Circuit's failure to follow this Court's precedent.

For these reasons, the IASB respectfully requests the Court to grant this Motion to file the accompanying *Amicus* brief.

Respectfully submitted,

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In the
Supreme Court of the United States

October Term, 1991

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BRIEF AMICUS CURIAE OF
ILLINOIS ASSOCIATION OF SCHOOL BOARDS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Curiae, Illinois Association of School Boards (IASB), is a voluntary non-profit association organized pursuant to Illinois law to aid and assist boards of education in performing their lawful functions and to promote, support, and advance the interests of public education in Illinois. *Ill. Rev. Stat.* ch. 122, par. 23-1, *et seq.* The IASB has 870 member school districts. Its governing body is a Board of Directors composed of members of local school boards whose combined experience gives the IASB a unique depth of understanding of the practical and legal considerations relevant to the operation of local school districts.

The issues raised in the decision below will impact each school district member of the IASB and are exceptionally important to their ability to effectively devise and implement appropriate educational placements under the Individuals with Disabilities Education Act (formally Education of the Handicapped Act), 20 U.S.C. § 1400 *et seq.* (hereafter "IDEA").

REASONS FOR GRANTING THE WRIT

For almost ten years, Illinois school districts have assessed their responsibility under federal law to provide an appropriate educational placement for handicapped children by using the standard announced by this Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In the decision below, the Seventh Circuit's requirement for an appropriate placement exceeded the *Rowley* standard. The Seventh Circuit's decision distorts *Rowley*, is contrary to those of other Circuit Courts of Appeals, and involves a significant question of federal law.

ARGUMENT

Introduction

Illinois school districts are gravely concerned by the Seventh Circuit Court of Appeals decision in this case, reported at 938 F.2d 712 (7th Cir. 1991). Petitioner, Consolidated School District 21 (hereafter "District"), after rigorously adhering to all procedural requirements, proposed an educational placement under the IDEA for Adam Brozer. *Id.* at 714. The state hearing officers and the District Court found that the hostile actions of Adam's parents, and those actions alone, prevented the proposed placement from being appropriate under the IDEA. *Id.* at 714-15. The Seventh Circuit concurred.

Illinois school districts fear and expect that this case will be widely used by parents who, until now, had no way of imposing their preferred placement. Further, school districts

expect this case to increase conflict between themselves and parents, resulting in a dramatic increase in federal court litigation. Finally, school districts expect this case to result in inappropriate placements for handicapped children whose parents successfully sabotage the district's efforts. Such consequences are avoided by a proper application of *Rowley*.

Circuit Judge Wood, Jr.'s dissenting opinion offers significant insight into the problems created by the majority opinion. *Amicus* IASB submits that his reasoning and conclusions are compelling and represent a proper application of *Rowley*. Circuit Judge Wood, Jr. warns that the approval of "unreasonable parental interference will precedentially cause school authorities additional future problems they do not need." *Brozer, supra* at 719. *Amicus* IASB joins in this warning; only action by this Court can forestall these problems.

I. The Seventh Circuit's Decision Creates a Standard for Determining the Appropriateness of an Educational Placement Which Is Contrary to Precedent, Confusing, and Unworkable.

Against the many challenges to their educational placements under the IDEA, Illinois school districts have relied on the standard for appropriateness announced in *Rowley*. A school district's proposed placement is appropriate, according to *Rowley*, if, in accordance with the IDEA's procedures, the individualized educational program (hereafter "IEP") is reasonably calculated to enable the child to receive education benefits. *Id.* at 203. The Seventh Circuit's decision herein distorts the *Rowley* standard and delivers the determination of appropriate placement into the hands of biased and untrained parents, provided they are sufficiently subversive to poison their child's mind against a reasonable and properly developed IEP.

Like the parents in the present case, the Rowleys were not satisfied with the school's proposed placement; they demanded a sign language interpreter in all of their

daughter's classes. *Id.* at 184-85. They argued that the IDEA's requirement that their child be provided a "free appropriate public education" (hereafter "FAPE") means that the educational placement be designed to maximize the child's potential. *Id.* at 198. Chief Justice Rehnquist (then Justice Rehnquist) rejected the Rowleys' interpretation of FAPE. Instead, he emphasized the word "benefit" in the statutory definition of FAPE and concluded that a placement is appropriate if it permits the child to benefit educationally from instruction. *Id.* at 200-204. The educational program developed for Amy Rowley satisfied this standard and it was unnecessary for the school district to provide Amy with the interpreter.

From 1982 until the Seventh Circuit's decision herein, educational placements have been judged by the standard announced in *Rowley*. Now, however, Illinois school district placements are also judged by whether the parents' behavior might intervene to sabotage an otherwise appropriate placement. While *Rowley* recognized the important role parents have in the development of a child's individual educational program, it nowhere suggested that parental preference should prevail when the parents have impaired a proposed placement's potential effectiveness for the child.

The Seventh Circuit's standard is unworkable. The decision below awkwardly affixes a new analytical construct to a framework that has been functioning smoothly for nearly ten years. *Rowley* is not broken, it requires no fixing.

Most troubling, the second tier of analysis imposed on *Rowley* by the Seventh Circuit is driven solely by irrational and counterproductive parental behavior. Under the decision below, the clinical manifestations of particular handicapping conditions become secondary to parental obstinacy; the judgment of impartial educational experts is subordinated to irrationality.

Decisions since *Rowley* have examined IEPs to determine if they are calculated to enable the child to receive education benefits. These cases typically involve parents seeking reim-

bursement for the cost of private education for their handicapped child when they believe that the program proposed by their local school district is inappropriate. Courts, with the exception of the Seventh Circuit in the present case, have refused to broaden or in any other manner modify the standard announced in *Rowley*. Observed the First Circuit:

> Following *Rowley*, courts have concluded that a FAPE may not be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice. Barring higher state standards for the handicapped, a FAPE is simply one which fulfills the minimum federal statutory requirements. *See, e.g., Lachman* [*v. Board of Education*], 852 F.2d [290] at 297 [(7th Cir. 1988), *cert. den.*, 488 U.S. 925] ("Parents have no right . . . to compel school district to instruct handicapped child in one specific method when district's method allows child to benefit from his education and progress toward his IEP goals."); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987) ("We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide (student) with educational benefits."); *Manuel R. v. Ambach*, 635 F.Supp. [791] at 794 [E.D.N.Y. 1986] (question is one of reasonable calculation of educational benefits; it "seems irrelevant" whether "one program is better than the other."); *Bertolucci* [*v. San Carlos Elementary School Dist.*], 721 F.Supp. [1150] at 1156 [N.D.Cal. 1989] (question of "better results" at another school does not affect district's placement if latter is appropriate: "The hearing officer was correct in focusing primarily on the District's placement, rather than on the alternative that the family prefers.").

G.D. v. Westmoreland School District, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original).

Likewise, courts have sustained IEPs under the *Rowley* standard where: there was evidence of a breakdown in the mutual efforts of the school district and parents to provide

an appropriate education for a handicapped child plus evidence that the child received little benefit from the program offered by the local school, *Cain v. Yukon Public Schools Dist. I-27*, 775 F.2d 15 (10th Cir. 1985), and where the parents frustrated the implementation of the IEP and the IEP was never given a chance to succeed, *Doe v. Defendant 1*, 898 F.2d 1186 (6th Cir. 1990).

School districts need guidance on the appropriate standard used to judge IEPs. The responsible individuals — professional educators and school board members — are confused by the lack of consistent treatment of a standard for assessing their recommended educational placements. The Seventh Circuit's standard is different from that announced in *Rowley* and its progeny, as illustrated above. The conflict between these decisions needs to be resolved by this Court in order to lessen the likelihood that federal courts will be besieged with such requests.

The reward unreasonable parental hostility will receive is a fundamental concern in this case. Parents, quite understandably, are emotionally attached to their opposition to an IEP. Parental opposition often manifests itself in heated discussions — after all, it is their child's education they are discussing. The decision below, however, provides an incentive for increasing the typical emotional simmer to a raging boil. The goals of the IDEA cannot be accomplished when unreasonable parental opposition is a reason for rejecting an otherwise appropriate placement.

The Seventh Circuit's decision requires school districts to initially determine whether parental hostility will pose a threat to the success of an IEP — an arduous task considering that the hostility will likely escalate as the matter progresses through administrative and judicial proceedings. As a practical matter, school districts may accede to parental placement demands fearing that the parents, armed with the decision below, will eventually prevail. Of course, if the parents prevail, the school district suffers the additional burden of paying the parents' attorney fees and related costs

pursuant to 20 U.S.C. § 1415 (e).

II. The Seventh Circuit's Decision Will Impede the Efforts of School Districts to Provide Handicapped Children with an Appropriate Public Education.

Chief Justice Rehnquist recognized that the quest for an appropriate placement for a handicapped child is properly left to the state and local schools. He stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child.

Rowley, supra at 207. The decision below undermines the state's and local school district's traditional role in choosing an educational placement by allowing parents to veto an otherwise appropriate placement by behaving in an unreasonable and hostile manner.

Emotion and opposition are present when parents disagree with a proposed placement. The decision below supplies the final ingredient in the recipe for defeating an otherwise appropriate placement — poison the child's mind toward the placement. Parents with the desire and motivation to accomplish that goal will often succeed; it is naive to think otherwise. A child will be affected by strong parental objection and will adopt that objection as his own. Every time this happens, is the IEP no longer calculated to enable the child to receive educational benefits? If so, this result subverts the IDEA's goal of providing handicapped children with access to a free public education.

It is dangerous educational policy to allow parents to control special education placement. Parents are typically ill-equipped to make placement decisions concerning their own child. Seldom do they have professional education training. Seldom do they know the variety of placement options available. Seldom do they know of particular conditions, such as

over-crowding. Seldom have they observed their child's classroom behavior and demeanor on a routine basis. Seldom are parents able to set-aside their emotional involvement to make an unbiased decision.

Parental attitudes should not be able to undermine an otherwise appropriate placement, no matter how extremely the parents are willing to behave. The desires of parents may be diametrically opposed to the best interests of the child. The focus of the IDEA should remain on the child, rather than the behavior of the parents.

III. The Seventh Circuit's Decision Creates Severe Hardships on School Districts and Will Dramatically Increase Conflict Between Parents of Handicapped Children and the Local School District.

School districts frequently face parents who disagree with the appropriateness of a proposed placement. The facts in the present case , therefore, are not new or unique. What is new and even startling is the deference given parental objection. The Seventh Circuit has given parents instructions on how to obtain their preferred placement for their handicapped child: poison the child's mind to the school district and its proposed placement by hostile attitudes and actions. These instructions will dramatically increase conflict between parents and local school districts.

With parents encouraged by the decision below to engage school districts in heated conflict over IEPs, a multitude of new conflicts will spill over into federal courts. Federal judges will be frequently called upon to decide if parental conduct has poisoned an otherwise appropriate placement. To defend these actions, school districts will suffer the loss of two valuable resources: time and money.

The Seventh Circuit's decision herein will alter the character of meetings to develope IEPs for handicapped students. A cooperative, conciliatory atmosphere will be replaced by antagonism as soon as the parents reasonably believe that the school district is disinclined to favor their preferred

placement. The best educational interests of the child cannot be assessed and discussed by individuals engaged in heated confrontation.

Parents who favor a private school placement can require the public school to pay the tuition by behaving in a combative, hostile matter. The local public school will be obligated to pay for the private placement even though it was the parents' action which made it impossible for the local school district to educate the child.

The impact of the decision below is clear: increased animosity between parents and local public school districts, increased litigation, increased expenses for defending otherwise appropriate placements, and increased expenses for placements in private schools. The goals of the IDEA are hampered when parental emotion is allowed to control educational placements. *Amicus Curiae* Illinois Association of School Boards submits that the petition for certiorari should be granted.

Respectfully submitted,

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MOTION TO APPEAR AS AMICI CURIAE AND BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, INC., COUNCIL FOR EXCEPTIONAL CHILDREN AND THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION IN SUPPORT OF PETITION

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No. 91-849

In the

Supreme Court of the United States

October Term, 1991

Board of Education of Community Consolidated School District 21,

Petitioners,

v.

Illinois State Board of Education and Sheldon and Pauline Brozer, on behalf of Adam Brozer,

Respondents.

No. 91-865

Illinois State Board of Education,

Petitioner,

v.

Board of Education of Community Consolidated School District No. 21, Cook County, Illinois, Douglas C. Cannon and Sheldon and Pauline Brozer on behalf of Adam Brozer,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO APPEAR AS AMICI CURIAE IN SUPPORT OF PETITION

Counsel for Petitioners Board of Education of Community Consolidated School District 21 in Case No. 91-849 and counsel for Petitioner, Illinois State Board of Education in Case No. 91-865 have consented to filing of the within brief. Letters attesting to their consent will be filed with this Court upon their receipt. Counsel for Respondents Sheldon and Pauline Brozer, on behalf of Adam Brozer, has refused consent.

The National School Boards Association (NSBA), The National Association of State Directors of Special Education (NASDSE), the Council for Exceptional Children (CEC), and the Council of Administrators of Special Education (CASE) move this Court for leave to participate as amici curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards

associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1401 et seq.. The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

Amicus curiae, NASDSE, is a nonprofit organization representing State education agency administrators responsible for directing, coordinating or supervising educational programs for children with

disabilities. Its members include State agency administrators in each of the 50 States, the District of Columbia, Puerto Rico, Bureau of Indian Affairs, and the territories. The NASDSE was established in 1938 and is the only major national educational organization representing State administrators of educational programs for children and youth with disabilities.

Each of the State educational agencies which NASDSE represents receives financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401 et seg.. These agencies are responsible for disbursing funds provided under this Act for the education of children with disabilities in their States, for assuring compliance with the requirements of the Act in their States, and for establishing the policies and procedures necessary for the implementation of the requirements of this Act.

The subject of this case is of great importance to NASDSE members because of its implications for the education of children with disabilities. The IDEA has established principles and procedures that serve as the critical foundation for assuring that all children with disabilities receive a free appropriate public education, based on their individual needs. Consistent adherence to these principles and procedures by all involved parties is essential to ensure that children with disabilities receive a free appropriate public education and that their educational rights are protected.

Amicus curiae, the Council for Exceptional Children (CEC), is the largest professional organization in the United States of educators involved in and concerned with the education of children with disabilities and gifted and talented children and youth. Amicus curiae, the Council of Administrators of Special Education (CASE) is the division of

CEC which represents program supervisors, administrators, and personnel who prepare special education administrators. CEC and CASE strongly support the underlying principles and mechanisms of the Individuals with Disabilities Education ACT (IDEA), which have been well-tested for soundness and efficacy during the past sixteen years. The Council and its division have great concern with the subject of this case, which, through its impact on the principles and mechanisms of the IDEA, could potentially adversely affect the ability of state and local school districts to provide a free, appropriate, public education to children with disabilities.

The decision below, if allowed to stand, will affect the administration of the IDEA by states and school districts across the land and will affect the education of thousands of children with disabilities in those states and school districts. Thus, Amici urge this

Court to grant them leave to present their views.

Respectfully submitted,

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Listen: Could that be a lull in the school litigation explosion? Perry A. Zirkel, The Executive Educator, July, 1989 29

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**ON PETITION FOR WRIT OF CERTIORARI
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**AMICI CURIAE BRIEF
IN SUPPORT OF PETITION**

INTEREST OF THE AMICI

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

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Each of the State educational agencies which NASDSE represents receives financial assistance under the IDEA. These agencies are responsible for disbursing funds provided under this Act for the education of children

with disabilities in their States, for assuring compliance with the requirements of the Act in their States, and for establishing the policies and procedures necessary for the implementation of the requirements of this Act.

Amicus curiae, the Council for Exceptional Children (CEC), is the largest professional organization in the U.S. of educators involved in and concerned with the education of children with disabilities and gifted and talented children and youth. Amicus curiae, the Council of Administrators of Special Education (CASE) is the division of CEC which represents program supervisors, administrators, and personnel who prepare special education administrators.

This case is of great importance to members of all four amici because of its implications for the education of children with disabilities. The IDEA has established principles and procedures that serve as the

critical foundation for assuring that all children with disabilities receive a free appropriate public education, based on their individual needs. Consistent adherence to these principles and procedures by all involved parties is essential to ensure that children with disabilities receive a free appropriate public education and that their educational rights are protected.

All amici strongly support the underlying principles and mechanisms of the IDEA, which have been well-tested for soundness and efficacy during the past sixteen years. Amici have great concern with the subject of this case, which, through its impact on the principles and mechanisms of the IDEA, could potentially adversely affect the ability of state and local school districts to provide a free, appropriate, public education to children with disabilities.

REASONS FOR GRANTING THE WRIT

The carefully crafted process established by Congress in the IDEA to ensure that every child with a disability receives a "free appropriate public education" cannot thrive in an adversarial atmosphere fostered by a standard which rewards parents, who are hostile and uncooperative to the point of a "siege mentality", by granting parents veto power over an admittedly "appropriate" public placement and awarding the parents' attorneys' fees as the prevailing party. The lower court's decision deferring to parental preference even while admitting that the school district followed the required procedures of the IDEA in good faith and offered an appropriate placement for the child [but for the parental hostility toward it] errs by fostering this statutory dysfunction.

ARGUMENT

I. The lower court's decision to allow parental "veto" over the "appropriate" placement recommendations of school districts, subverts the process Congress constructed to facilitate decisionmaking about appropriate educational placements and services.

The IDEA is a grant statute setting forth broad procedural mechanisms relating to the educational program to be provided children with disabilities. The purpose of the Act is to ensure that each child with a disability, as defined under the statute, receives a "free appropriate public education." The statute includes a number of affirmative requirements relating to the evaluation of the child, consultation with parents and educational experts, development of an individualized education program (IEP) and, finally, specific due process requirements.

Congress carefully crafted the administrative procedures under the IDEA to ensure that parents, the school district, teachers and other specialists work together

to design an "appropriate" educational program for the child, to determine the child's unique educational needs, an appropriate placement to meet those needs, and the "related services" supporting them.

To foster cooperation between parents and the school district, the statute grants certain rights and imposes certain obligations -- the right of parents to be present, to participate and to seek advice from experts in the development of the IEP, and the obligation of the school district to take into account the parents' educational experts and to obtain parental permission before making any change in the program of the child, to name but a few.

The requirement that the school district develop an IEP in partnership with the parents for each child with a disability is the "modus operandi of the Act". Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 368 (1985). Under the IDEA an eligible child with

a disability has the right to be evaluated periodically by a group of experts to determine the child's individual educational needs and to set individual goals for that child. Parents have substantial input into the process through notice at every stage, the right to obtain an independent evaluation which the school district must review, and ultimately, the right to a hearing where there is a dispute. Congress intended the IEP process to be a continuing cooperative process between the experts in the school district and the parents of the child with a disability.

> [It is the method] of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parents with a written statement of what the school intends to do for the handicapped child.
>
> It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship. Rather, the Committee intends to ensure adequate involvement of the parents

> or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision . . . By changing the language of this provision to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975).

During debate on the Act the sponsors discussed the IEP conference at length. Senator Stafford, for example, stated:

> [A]n extremely important aspect is the requirement that each handicapped child will have individual planning conferences. The participants will include the parents, the teacher, and a qualified supervisor or provider of special education services. . . An additional benefit that will result from these conferences is one that is too often overlooked. Not only will the child be better served, and the parents better informed of the limitations their child has due to a particular handicap, but the teacher

> will learn from this experience as well.
>
> As we look more and more toward children with handicaps being educated with their "normal" peers, we must realize, and try to alleviate the burden put upon the teacher who must cope with that child and all the others in the class as well. The teacher needs reinforcement and a better understanding of the child's abilities and disabilities.
>
> It is hoped that the participation in these conferences will have a positive effect on the attitude of the teacher toward the child and an understanding of the child's problems in relating to his or her peers because of a handicapping condition.

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975).

This Court has recognized that Congress intended the IEP process to be a cooperative dialogue between schools and parents:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

* * *

> We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.' [Citation omitted.] We think that Congress shared that view when it passed the Act. . .
>
> Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. . .

Board of Educ. v. Rowley, 458 U.S. 176, 207-208 (1982).

II. The educational objectives of the IDEA are undermined by a ruling that gives parents the absolute right to dictate the educational program for their child.

Parents and school districts often have good faith disagreements as to the educational needs of a child with a disability. Where those differences cannot be reconciled the Act contemplates that the final decision be made by hearing examiners and courts, not by either

the school district or the parents. Parents naturally desire what they believe is best for their child but parents may be incorrect in their wishes for the child. For example, in this case it took two hearings before the parents finally agreed that their child's primary disability was a behavior disorder with a secondary condition of learning disability. Further, they want to remove the child from the jurisdiction of the school district which they believe has failed in its duty to educate the child. But all of the hearing examiners and courts that have heard this case have disagreed with the parents in this regard and found that the school district has at all times operated in good faith and proposed a program for the child that is educationally appropriate. Nonetheless, the parents obtained their desired placement through means never contemplated by the Act.

If decisions such as the one below are allowed to proliferate, as they undoubtedly

will in absence of intervention by this Court, school districts will find it difficult, or even impossible, to challenge parental demands even where they strongly believe that the child's educational interests are not served by the parents' proposed educational program.

The court below attempts to mitigate the precedential effect of its decision by arguing that this is an unusual situation. It is not. Parents sometimes have feelings of hostility about the district and feel that the school district does not have the best interests of the child in mind. Although that perception may not be well founded, it is understandable. Usually such parents will suppress their hostility and other negative emotions and will work with the district to develop an acceptable educational program for the child. The parents here have chosen to express their hostility in all of the forums in which first, the educational classification of their child was at issue and second, the educational

placement for their child was discussed. It is the expression of that hostility that has led the hearing officers and the courts to rule that the well was poisoned and parental preference must govern.

Under the precedent of the decision below parents will now be encouraged to express their hostility in order to achieve their goals. This is not just one unusual case in one circuit, as the court of appeals would have us believe. The community of parents of children with disabilities is active, vocal and well organized. These parents often have strong views about the education of their children which cause them to contest the school district's proposals. Their purpose is not to be obstructionists, and they operate in good faith, just as the school district does. Despite their strong feelings, parents usually act rationally in the hearing, relying on their experts to make their case, just as the school district does. However, in view of

the decision below, parents may now begin to express hostility in the due process hearings, rather than trying to work with the district. Counsel for the parents and other parental advocates may suggest that parents express their negative feelings, even hostilities, about the school district's proposed program for their child even perhaps to the extent of asking the child to oppose the district as well. This expression of hostility will be but a technique to achieve the goals they have for their child and a very effective technique it will be if the decision below is allowed to stand. The principle of the end justifying the means will be firmly in place.

Furthermore, parents using this approach will not even need to actually allege their "hostility" to the placement as the basis for their position that the school district's proposed IEP fails to benefit the child. Just as the courts and hearing examiners did below, examiners and courts may, sua sponte, take

the expression of parental hostility into account, relying on the precedent of the instant case to justify ordering the parents' preferred placement.

The decision below will result in unnecessarily high costs for school districts in the implementation of appropriate programs because it will be a tempting precedent for parents to use to get anything they want. Many parents, for their own reasons which may not be related to the educational needs of their child, want a private education for their child even where there is an "appropriate" public placement for the child in the school district. Either because they feel that there is some kind of "stigma" attached to the public setting (particularly in the case of children who are emotionally disturbed or behaviorally disordered) or for some other reason, they will not accept the public placement. These private settings can cost as much as $75,000 to $100,000 per year,

per student. See, e.g., Drew v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989), (parents reimbursed for residential school in Tokyo); In Re Smith, 926 F.2d 1027 (1991) (court upheld, as not unreasonable, school district agreement to pay $200,000 a year for a residential placement).

These affirmative parental desires can easily be transmuted, with the guidance of counsel and the seal of approval of cases like the one at bar, into hostility to the public placement. The parents are doing what they believe is right for their child and cannot be faulted for taking extreme steps to meet that end. But the judicial process should not become a pawn of this process.

The court of appeals stated that "we do not share the school district's concern that under our ruling parents will be able to feign opposition to obtain their preferred placement." Parents do not need to "feign" opposition. The only reason they go to a

hearing is because they oppose the school district's recommendation. The issue is the level of opposition and the willingness of the parents to express that opposition. Even assuming the hearing examiner is able to determine whether the level of opposition is sufficient to jeopardize the effectiveness of the placement, it defies logic that such a determination is held to be relevant.

Congress did not intend to give parents a veto power over the educational program of school districts. It intended only to give parents the opportunity to be equal participants in the process with the right to convene due process hearings for the purpose of making an independent determination as to whether the school district's proposed program is educationally appropriate. But the elaborate procedural scheme of the IDEA and this Court's admonition in Board of Education v. Rowley to defer to the educational officials in the school district provided the

district has complied with the procedures and has developed an IEP that is "reasonably calculated to enable the child to receive educational benefits" are for naught if the precedent of this case is allowed to stand.

Under the lower court decision the school district's proposed educational program, though otherwise appropriate, is doomed from the start solely because of the negative attitude of the parents. The school is not even given the chance to attempt to work with the child to change his attitude about the school. The goal of the IDEA is, after all, to give children with disabilities the skills to go into society and live and work like their nondisabled counterparts. That is the mission of the school district and of the myriad of educational experts employed by the district -- to teach the child to live and work in his environment. He should not be taught that he can alter his environment at will merely by being hostile to it.

Further, we know of no research base to demonstrate that parental disapproval or even parental hostility to a proposed program necessarily precludes the successful implementation of that program to the ultimate benefit of the child. The parents in the instant case did not even raise the issue of their hostility to the placement precluding their child from benefitting from it. This novel "educational" concept was a creation solely of the hearing examiners and the courts below.

III. The decision below in effect "reverses" this Court's decision in Board of Education v. Rowley.

This Court held in its first decision under the IDEA (then the Education for All Handicapped Children Act) that courts should defer to the educational decisions of school districts as long as the district complied with the administrative procedures of the Act and developed an individualized educational program that was reasonably calculated to

enable the child to receive educational benefits.

Lower courts have also emphasized that parental preference is not the standard to be used in determining "appropriate" placement. In Schimmel v. Spillane, 630 F.Supp. 159 (E.D. Va. 1986), the district court determined that a private placement chosen by the parents was inappropriate because it did not meet the state's requirements for approval as a special educational school. The court noted that:

> Parents of handicapped students may not, because of personal desires, select a private institution of their choice and have the school system pay for the tuition. While the desires of the parents may be well motivated in that they seek the best for their child, the placement decision must be made by the school system in accordance with approved standards.

630 F.Supp. at 162. See, also, Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).

As this Court ruled in Rowley, there is no guarantee of a particular outcome. Even where a school district failed to demonstrate

that a student is receiving an educational benefit, this does not automatically mean they are providing an inappropriate program. In re Ronald M., Case No. 1985-26, 1985-86 EHLR DEC 507: 355, 356 (Ga. State Hearing Officer Dec., Aug. 20, 1985). In the instant case the school district has not even been given the opportunity to demonstrate that the student would benefit from the public placement.

> The education of the children of this state should be a partnership between the parent and the state, or school district. The education of all our children is an important goal for the success of our society. It is best achieved by cooperation between the student, his or her parent, the teachers, and the school administrators involved in the child's education. The appellant has been unwilling to cooperate with the school district and [the student's] teachers in order to resolve problems which could have been solved by cooperation. The failure to use the degree of professionalism exhibited by the school district can only interfere with and impede [the student's] education."

In re Michael T., Case No. 85-4, 1984-85 EHLR DEC. 506:333, 334 (Wash. ALJ Dec. April 3, 1985).

Undoubtedly, the school district in this case if allowed to implement its plan for public placement will take into account in working with the child, the adverse effects on the child of parental hostility toward the school and will develop educational methodologies to ameliorate such hostility. School districts also consider other negative influences on the child such as death or divorce in the family, parental abuse, socio-economic influences etc. Although these other negative influences are considered by the school district in developing an appropriate educational plan for the child, none of these factors -- and particularly not a temporary factor such as parental hostility -- should ever be the sole or definitive factor in determining placement. Parental hostility is outside the scope of the IDEA. It may be

relevant to the choice of methodology but it is not relevant to the determination of compliance with the "free appropriate public education" requirement of the IDEA.

The courts below have, in effect, turned the second prong of the Rowley test on its head. The parents' belief that the child cannot benefit from the placement proposed by the school district has become a self-fulfilling prophecy because, if the parents' expression of that belief is sufficiently impassioned, the court will hold that the child cannot benefit under the standard in Rowley. Surely, this Court did not intend such a result.

IV. Under the precedent below the school district must pay the parents' attorneys fees even though the school district was held to have followed the procedures of the IDEA, acted in good faith and proposed a "free appropriate public education" for the child.

Although all the hearing officers and both courts agreed that the school district's proposed placement was "appropriate," the

parents were awarded attorneys' fees as the "prevailing party." The district court agreed with both hearing officers that the school district's proposed placement was "appropriate" but also agreed that the officers were correct in taking into account the parents' "hostility" to the proposed public placement. Therefore, the court ruled that the parents "prevailed" and awarded attorneys' fees to the parents. In effect, good performance is rewarded with a fiscal penalty.

Making unreasonable demands entails no risk to parents; if the student's ultimate educational plan is that requested by the parents, their lawyers will charge the school district attorney's fees even if the school district has proposed an appropriate plan. But the educational process suffers through needless delays and animosity between parents and school personnel; Congress' carefully

drawn consensus-building arrangement is for naught.

The lower courts did not reach the question of whether the parents' proposed placement in this case is also "appropriate." But under the precedent in this case the parents would not necessarily have to propose an appropriate placement in order to prevail. The only standard is their "hostility" to the school district's proposed placement. This does a great disservice to the education of children with disabilities.

The court of appeals expressed its concern that placing the child in the school district's proposed setting would punish the child for the parents' intransigence. Amici disagree with that analysis because it assumes that the placement cannot benefit the child without first affording the school district an opportunity to educate the child in the public setting and to work with the child to overcome his feelings about the school. But even were

the court's concern justifiable, it is still impossible to understand why the court would reward the parents for their hostility by granting them attorneys' fees. How does it punish the child to make the parents pay their own fees? This is another example of how the lower court has turned the Act on its head. Parents are rewarded for defying the procedural scheme of the Act and for their hostility and refusal to attempt to work with the district. There is no way that the endorsement of this type of behavior can lead to an enhancement of the education of children with disabilities. This precedent can do nothing but seriously damage the prevailing attitude of cooperation between parents and schools which, under the law before this case, were required to work together.

V. Conclusion

Litigation involving children with disabilities is on the upswing, while other litigation against school districts is on the

decline. Listen: Could that be a lull in the school litigation explosion? Perry A. Zirkel, The Executive Educator, July, 1989. Amici are deeply concerned that the decision below will be a catalyst for new disputes. In addition, because of lower court decisions expanding the reach of the attorneys' fees provision of the IDEA, 20 U.S.C. section 1415(e)(4)(B) et. seq., to include the administrative level, school districts are not in the financial position to contest parental demands even where the district believes that the school district's proposed educational plan for the child is correct.

Amici urge this Court to review the decision at bar. Although this Court may be reluctant to review a case which is unique in its treatment of the law, the case is

nevertheless a devastating precedent for every school district in this country.

Respectfully submitted,

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